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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1986

NU-CAR CARRIERS, INC.,
Petitioner,

vs.

LARRY T. VARNUM,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Eleventh Circuit

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QUESTION PRESENTED

Whether a state law cause of action for fraudulent misrepresentation is preempted by Section 301 of the Labor-Management Relations Act or by the National Labor Relations Act where (1) employer representations made to the plaintiff prior to his employment correctly reflected the terms of the existing collective bargaining agreement, (2) collective bargaining which occurred after the plaintiff's employment resulted in a change affecting such representations, and (3) at the time the representations were made, the employer did not inform the plaintiff that it might propose a change in the collective bargaining agreement which could affect the continuing validity of its representations?

STATEMENT OF CORPORATE AFFILIATION

Nu-Car Carriers, Inc. (hereinafter "Nu-Car") is a Massachusetts corporation. It is a wholly owned subsidiary of Leaseway Transportation Corp. Leaseway Transportation Corp. is a Delaware corporation and in addition to Nu-Car also owns the following subsidiaries:

Subsidiaries of
Leaseway Transportation Corp.

A. J. Warehouse, Inc.
A & S H D Service Corp.
AMAC Trucking Incorporated
A. R. Gundry, Inc.
Akron Distribution Centers, Inc.
Amgo Trucking Company
Anchor Motor Freight, Inc.
Arco Auto Carriers, Inc.
Associated Consultants, Inc.
Atlas Service Co.
Automotive Transportation Systems, Inc.
A to Z Cartage, Co.
B & D Motor Parts, Inc.
Baywood Express, Inc.
Bejin Trucking Company
Best Transport, Inc.
Better Home Deliveries, Inc.
Black Horse Brokers, Inc.
Black Horse Carriers, Inc.
Boston Deliveries, Inc.
Bulk Storage, Inc.
Charlton Transport (Quebec) Limited

Classic Carriers, Inc.
Cryogenic Carriers, Inc.
Custom Deliveries, Inc.
Dedicated Freight Systems, Inc.
510 W. 21st St. Corp.
Fleet Carriers, Inc.
Fleet Transport Company, Inc.
Geo. McNeil Teaming Company
Gold Star Enterprises, Inc.
Gold Star, Inc.
Gross & Hecht Trucking, Inc.
Gypsum Haulage, Inc.
Inter-City Trucking Service, Inc.
Leaseway All-Services, Inc.
Leaseway Bulk Services, Inc.
Leaseway Customized Transport, Inc.
Leaseway Deliveries, Inc.
Leaseway Distribution Centers, Inc.
Leaseway Finance Corp.
Leaseway Haulers, Inc.
Leaseway Intermodal Company
Leaseway International Corp.
Leaseway International Distribution Systems, Inc.
Leaseway Investments, Inc.
Leaseway Ltd.
Leaseway Motorcar Transport Company
Leaseway Multi-Transportation Services, Inc.
Leaseway National Service Corp.
Leaseway of Detroit, Inc.

Leaseway of Puerto Rico, Inc.
Leaseway Park East Corp.
Leaseway Personnel Corp.
Leaseway Purchasing Corp.
Leaseway Sewage Works Corporation
Leaseway TRM, Inc.
Leaseway Transfer Pool, Inc.
Leaseway Transportation Finance N.V.
Leaseway Transportation Marketing Corp.
Leaseway Trucking, Inc.
Leaseway Warehouses, Inc.
Logistics Partners Company
Logistics Resource, Inc.
M H D Services Inc.
McLarty Leasing System, Inc.
McLarty Leasing System, Inc. (Texas)
Melchin Auto Transport Ltd.
Middlesex Leasing Corp.
Midwestern Distribution, Inc.
Mitchell Transport, Inc.
Mountainside Transport, Inc.
Niedert Fleet Management Corp.
Niedert Freight, Inc.
Niedert Terminals, Inc.
Northern Ohio Materials, Inc.
Nu-Car Carriers, Inc.
Quest Partners Company
Quick Connection Broker Systems, Inc.
Ray Molder Carrier Corporation
Ray Molder, Inc.

Refiners Transport & Terminal Corporation
Savannah Service, Inc.
Signal Delivery Service, Inc.
Somerset Driver Corp.
Stam-Win, Inc.
Sugar Transport, Inc.
T-I Company
Terminal Personnel, Inc.
Transco Group, Inc.
Transco Service-Oakland, Inc.
Transco Service-Sacramento, Inc.
Transportation House, Inc.
Trident Export Corporation
Union Terminal Warehouse, Inc.
Universal Leaseway System of Canada, Ltd.

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To the United States Court of Appeals
For the Eleventh Circuit

The Petitioner, Nu-Car Carriers, Inc., respectfully prays that a Writ of Certiorari issue to review that judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in the above-captioned matter, bearing Case No. 85-3898, on the 20th day of November, 1986.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eleventh Circuit in Case No. 85-3898 is reported at 804 F.2d 638 and is reproduced in the Appendix at pages A1 to A18.

The Opinion of the United States District Court for the Middle District of Florida in Case No. 84-1416-Civ-J-14 was delivered orally by the Court on October 22, 1985 at the hearing conducted on Defendant Nu-Car Carriers, Inc.'s Motion for Summary Judgment. The Transcript of

Motion for Summary Judgment announcing the unreported Opinion of the Court is reported in the Appendix at pages A20 to A49.

The Judgment Entry of the United States District Court for the Middle District of Florida in Case No. 84-1416-Civ-J-14 is reproduced in the Appendix at page A19.

Respondent's complaint was initially filed in state court in the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida as Case No. 84-14461-CA. The complaint was subsequently removed by Nu-Car to the United States District Court for the Middle District of Florida. The final judgment of dismissal of the Florida Circuit Court is reproduced in the Appendix at page A50.

The Judgment Entry of the United States Court of Appeals for the Eleventh Circuit in Case No. 85-3898 is reproduced in the Appendix at page A51.

JURISDICTION

The decision of the Eleventh Circuit Court of Appeals issued on November 20, 1986. Petitioner filed a timely Petition for Rehearing *En Banc* on December 10, 1986. The Petition for Rehearing *En Banc* was denied by the Court of Appeals in an Order entered December 24, 1986, which is reproduced in the Appendix at pages A53 and A54. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

STATUTORY PROVISIONS INVOLVED

Labor-Management Relations Act of 1947 Section 301 (a), 29 U.S.C. Section 185(a):

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

National Labor Relations Act Section 9(a), 29 U.S.C. Section 159(a):

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, that any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

STATEMENT OF THE CASE

Petitioner, Nu-Car Carriers, Inc. (herein "Nu-Car"), is a common motor carrier engaged in the business of transporting new automobiles for various customers. At its terminal in Jacksonville, Florida, Nu-Car employs owner-

operators; i.e., truck drivers who operate their own tractors to haul Nu-Car's trailers and cargo. Since approximately 1973, the owner-operators in Jacksonville have been represented for purposes of collective bargaining by Local Union No. 512, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein "the Union"). At all times pertinent to this case, a collective bargaining agreement covering the terms and conditions of employment for the owners-operators was in effect between Nu-Car and the Union.

On June 2, 1983, Nu-Car hired the Respondent, Larry T. Varnum (herein "Varnum"), as an owner-operator at the Jacksonville terminal. Prior to Varnum's employment, Nu-Car's Terminal Manager, Paul McAllister, made certain representations to him relative to his employment with the Company. Specifically, McAllister represented to the Respondent that: (1) owner-operators for Nu-Car generally received an average gross monthly income of approximately $7,000.00; (2) dispatch of loads would be administered on a "first-in, first-out" basis; and (3) Varnum's home base would be Jacksonville, Florida. *Significantly, it is undisputed that at the time these representations were made, they were entirely true and, indeed, accurately reflected the existing terms of the collective bargaining agreement between Nu-Car and the Union.*[1]

McAllister fully informed Varnum prior to the time he started work that Nu-Car's owner-operators were represented by the Union, and that the terms and conditions of

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1. The relevant collective bargaining agreement unambiguously set forth a "first-in, first-out" dispatch system and restricted the pick-up of loads away from Varnum's Jacksonville home base to single trips only. Moreover, computer printouts which were reviewed with Varnum prior to his employment correctly reflected that the average gross earnings for Nu-Car's owner-operators equalled approximately $7,000.00 per month.

his employment were contained in a collective bargaining agreement between Nu-Car and the Union.

Respondent began employment consistent with the foregoing representations on June 2, 1983. On or about June 27, 1983, Nu-Car began efforts through its Vice-President of Industrial Relations, Bruce Jackson, to negotiate a mid-contract concession with the Union. McAllister played no role in these negotiations whatsoever, nor was he involved in the pre-negotiation planning. Particularly, Nu-Car proposed a change in the contract to extinguish the Company's obligation to make health, welfare, and pension contributions on behalf of its owner-operators during periods of layoff. During the course of several bargaining sessions, the Union eventually presented Mr. Jackson with a counter-proposal. Therein, the Union agreed to the Company's change if Nu-Car would agree to modify the method of dispatch from "first-in, first-out" to a seniority based system. Agreement on the Union's counter-proposal was reached by the parties on or about July 8, 1983, and Nu-Car implemented the seniority dispatch system on approximately July 13, 1983.

Varnum continued to work for Nu-Car for nearly eight (8) months after the dispatch system was changed. As a relatively junior employee, Respondent's earnings were somewhat adversely affected by the change to a seniority based dispatch system. Mr. Varnum resigned his employment with Nu-Car effective March 12, 1984.

More than eight months later, on November 21, 1984, Varnum filed a complaint in Florida Circuit Court alleging a state tort cause of action against Nu-Car for "fraudulent misrepresentation." In his complaint, Varnum claimed that Nu-Car made the aforementioned pre-employment representations, yet had failed to fulfill them during

his employment. The complaint also alleged that Nu-Car knew at the time the representations were made that said representations were false. (Respondent's complaint is contained in the Appendix at pages A55 to A60. See Paragraphs 3, 5, and 6, therein.) Varnum's complaint failed to mention that he was represented by the Union and that the terms and conditions of his employment were governed by the negotiated collective bargaining agreement. Nu-Car timely removed Respondent's complaint to the U.S. District Court for the Middle District of Florida based on diversity of citizenship, pursuant to 28 U.S.C. Sections 1332 and 1441.

In June 1985, Nu-Car moved the U.S. District Court for summary judgment arguing, in part, that Varnum's complaint was preempted by Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. Section 185, and by the National Labor Relations Act, 29 U.S.C. Sections 151-169. At a hearing on the motion conducted on October 22, 1985, the District Judge orally ruled that because the alleged misrepresentations were specifically addressed in the collective bargaining agreement, Varnum's state law claim was preempted by Section 301. (Appendix at pages A48 and A49.) In rendering summary judgment in favor of Nu-Car, the District Judge specifically addressed certain evidence presented by Varnum to the effect that McAllister knew at the time the subject representations were made that the Company was going to propose a change in the dispatch system from "first-in, first-out" to a seniority based system. In this respect, the District Court found that McAllister had only heard "rumors" of such a proposal. Moreover, the Court held that even if McAllister did have actual knowledge of such a proposal, that fact would not preclude summary judgment in favor of Nu-Car since the representations made by McAllister

were true at the time they were made, and McAllister could not possibly have known what would happen to the proposal through the course of collective bargaining with the Union. (These findings of the District Court are contained in the Appendix at pages A29, A30, A31, A32, and A35.) The District Court permitted Varnum 20 days within which to amend his complaint to allege misrepresentations not covered in the collective bargaining agreement. Varnum did not amend the complaint and filed a timely Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit.

On November 20, 1986, the Eleventh Circuit rendered an Opinion reversing and remanding this case to the District Court. In its decision, the Appeals Court found that the District Court had misconstrued the essence of Varnum's complaint. As his complaint was interpreted by the Appeals Court, Varnum was not complaining about the negotiated change in the dispatch procedure at all. Rather, the Appellate Court found that the gravamen of Varnum's complaint was "about the failure of Nu-Car to inform him of the impending change [in the dispatch procedure] while inducing him to accept employment." (Appendix at page A7.) On this basis, the Eleventh Circuit found that Respondent's complaint was not preempted by Section 301 of the Labor Management Relations Act, citing *Belknap, Inc. v. Hale*, 463 U.S. 491, 509-511 (1983).

In addition, the Appeals Court rejected Nu-Car's argument that Varnum's complaint was preempted under Section 9(a) of the National Labor Relations Act ("NLRA"), which prohibits employers from "direct dealing" with individual employees in the absence of the majority designated collective bargaining representative. In this respect, the Appeals Court reasoned that Varnum was not

claiming that Nu-Car had a duty to disclose the dispatch proposal to him. Instead, the Court argued that Varnum was merely claiming that in the absence of such a disclosure Nu-Car should not have represented that the owner-operators were making average earnings of approximately $7,000.00 a month. Thus, because Nu-Car was not being asked by Varnum to make a disclosure prohibited under the NLRA, the Court held that his complaint was not preempted by that Act.

It is undisputed that the labor agreement between Nu-Car and the Union contained a full grievance procedure culminating in the final and binding resolution of disputes submitted to it. At no time did Varnum file a grievance against Nu-Car relative to the claims made in his complaint. At no time did Varnum institute either an internal union complaint or a civil action alleging that the Union breached its duty to fairly represent him when it proposed the seniority dispatch procedure.

REASONS FOR GRANTING THE WRIT

The decision of the Eleventh Circuit is in conflict with the United States Supreme Court and various Courts of Appeals' decisions concerning the preemption of state tort causes of action by Section 301 of the Labor-Management Relations Act. Specifically, the instant decision directly contradicts the United States Supreme Court's decision in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), and with various Courts of Appeals' decisions which have applied *Lueck* to facts such as those presented by this case.

In addition, the Eleventh Circuit's decision directly conflicts with the National Labor Relations Act preemp-

tion doctrine established by the Supreme Court in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), and with various Courts of Appeals' decisions applying *Garmon* to cases similar to the instant action. Moreover, as explained below, the unavoidable effect of the Eleventh Circuit's decision is to create a duty on the part of employers to reveal contemplated collective bargaining proposals to prospective employees *before* such proposals are ever communicated to the union. Such a result totally undercuts federal labor policy which seeks to promote industrial peace by encouraging good faith collective bargaining directly between employers and the designated representatives of their employees. *See, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962).

I. THE APPELLATE COURT ERRED IN HOLDING THAT RESPONDENT'S STATE CAUSE OF ACTION FOR FRAUDULENT MISREPRESENTATION IS NOT PREEMPTED BY SECTION 301 OF THE LABOR-MANAGEMENT RELATIONS ACT.

In *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), this Court unanimously held that:

> [W]hen resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in the labor contract, that claim must either be treated as a Section 301 claim (citation omitted) or dismissed as preempted by federal labor-contract law. 471 U.S. at 220.

The court further explained that where "evaluation of the [state] tort claim is inextricably intertwined with consideration of the terms of the labor contract", the state cause of action is preempted. *Lueck*, 471 U.S. at 211.

As interpreted by the Appeals Court, Varnum's state cause of action for fraudulent misrepresentation arose from Nu-Car's failure to inform him at the time he was hired, of the dispatch proposal which was then allegedly pending. Unquestionably, that proposal ultimately became part of the collective bargaining agreement between Nu-Car and the Union. Given that fact, there is simply no way around the inextricable meshing of the collective bargaining agreement with Varnum's claim. Had the dispatch proposal not become part of the labor agreement, clearly Respondent's tort claim would never had arisen. Because Varnum's claim is "inextricably intertwined with consideration of the terms of the labor contract", and is "substantially dependent upon analysis of the terms of [the labor] agreement", his claim is subject to preemption under *Lueck*.

The Eleventh Circuit's decision is not only in conflict with *Lueck*, it also conflicts with several Courts of Appeals' decisions which have preempted state tort actions under Section 301 similar to the claim raised by Varnum. In *Bale v. General Telephone Company of California*, 795 F.2d 775 (9th Cir. 1986), the Ninth Circuit held that the plaintiff's state causes of action for fraud, negligent misrepresentation and breach of contract were preempted by Section 301, citing *Allis-Chalmers v. Lueck, supra*. There, as here, the fraud claim arose from alleged pre-employment representations made by the employer which could not be fulfilled in view of the applicable language in the collective bargaining agreement. Specifically, the plaintiffs in *Bale* were told prior to the time they were employed that they would automatically become "regular" employees after six months of employment. Based upon the language in the applicable labor agreement, this representation was untrue at the time it was made. Plaintiffs'

State Court complaint was removed by defendant to the Federal District Court, which dismissed the state tort claims as preempted by Section 301.

In affirming the District Court's decision, the Ninth Circuit addressed the plaintiffs' argument that their state tort claim did not arise from interpretation of the collective bargaining agreement, but rather arose from representations outside of and unrelated to that relationship. In rejecting that argument, the Court held:

> We cannot agree that *Bale's* and *Fife's* claims are sufficiently removed from the collective bargaining agreement to fall outside the preemptive ambit of Section 301 . . . Here, as in *Allis-Chalmers,* adjudication of their state tort claims would require reference to, and interpretation of, the terms of the collective bargaining agreement. In order to prove their fraud and negligent misrepresentation claims, *Bale* and *Fife* would be required to show that the terms of the collective bargaining agreement differed significantly from the individual employment contracts they believed they had made. Resolution of their state tort claims is therefore "substantially dependent upon an analysis of the terms of an agreement made between the parties and the labor contract." *Allis-Chalmers,* 105 S. Ct. at 1916. 795 F.2d at 779-780.

The decision in the instant case further conflicts with the Seventh Circuit's holding in *Gibson v. AT&T Technologies, Inc.,* 782 F.2d 686 (7th Cir. 1986), *cert. denied,* 106 S. Ct. 3275 (1986). In *Gibson,* the plaintiffs brought suit in Federal District Court also alleging a cause of action in fraud under state law. In their complaint, the plaintiffs claimed that their employer wrongfully withheld information concerning its plans to close the plant at which

plaintiffs were employed. In the absence of information on the plant closing, plaintiffs voluntarily resigned their employment in order to participate in a Supplemental Income Protection Program provided in the collective bargaining agreement between plaintiffs' employer and their union. Under this program, plaintiffs received less money than they would have been entitled to had they continued their employment and been layed off at the time the plant closed. The District Court granted the employer's motion for summary judgment, finding that plaintiffs' state law tort claim was preempted by Section 301.

On appeal, the Seventh Circuit upheld the District Court's decision finding that, "[d]espite plaintiffs' attempt to characterize their action under state tort law, their action actually arises from a collective bargaining agreement and thus is controlled by federal law." *Gibson* at 688. In this respect, the Seventh Circuit specifically noted that its holding was dictated by the Supreme Court's decision in *Allis-Chalmers v. Lueck, supra*. *Gibson* at 688.

The Eleventh Circuit's decision in this case also conflicts with the decision of the Fifth Circuit rendered in *Eitmann v. New Orleans Public Service, Inc.*, 730 F.2d 359 (5th Cir. 1984), *cert. denied*, 469 U.S. 1018 (1984). In *Eitmann*, the plaintiff alleged that prior to his employment he was advised by the employer that he would continue to receive full compensation during any period of disability resulting from a work-related injury. Thereafter, Eitmann was injured on the job and was subsequently discharged. The collective bargaining agreement which covered the plaintiff's employment stated that the company had the right to dispense with the services of any employee at its sole discretion. Plaintiff filed suit in state court alleging breach of an individual contract of employment under which

the employer had agreed to continue his employment even in the event of a disabling work-related injury. The employer removed the case from state court to Federal District Court, where summary judgment was granted in its favor on the grounds that plaintiff's claim, in fact, stated a federal cause of action subject to preemption under Section 301.

In upholding the District Court's dismissal in *Eitmann*, the Fifth Circuit recognized that the plaintiff was alleging, as is Varnum in this case, that he was entitled to something in excess of what the other employees covered by the collective bargaining agreement were entitled to receive. In this respect, the Court rejected Eitmann's contention that his individual contract should be interpreted to supersede the provisions of the collective bargaining agreement. *Id.* at 363. The Court found that to the extent the representations made to the plaintiff prior to his employment were inconsistent with the existing collective bargaining agreement, the terms of the collective bargaining agreement must prevail. *Eitmann* at 362-363. The district judge in the instant case found *Eitmann* as persuasive authority in support of her finding that Varnum's state law claim was preempted by Section 301. (Appendix at page A49.)

Although the Eleventh Circuit in this case distinguished *Eitmann* based upon the Supreme Court's decision in *Belknap, Inc. v. Hale,* 463 U.S. 491 (1983), the Court's reliance on *Belknap* is clearly misplaced. Varnum's claim in this case is not analogous to the claims asserted by the plaintiffs in *Belknap*. There, the Supreme Court recognized the plaintiffs' right as strike-breakers to bring a state cause of action for breach of contract against their employer, *where no collective bargaining agreement was in effect.*

See, Belknap at 507. Indeed, the argument was never raised in *Belknap* that the state law action was preempted by Section 301. Rather, the defendant employer argued that since its offer of permanent employment to the strike-breakers was arguably an unfair labor practice, their state action was preempted by the National Labor Relations Act. In this context, the Supreme Court balanced the competing interests of the employer, the regular employees, and the strike-breakers, and concluded that the NLRA would not preempt the strike-breakers' state law action. *Belknap, supra.* Unlike *Belknap* there are only two parties involved in this case: Nu-Car and Varnum. Moreover, it is undisputed that Varnum was subject to the terms and conditions of a collective bargaining agreement and had access to the grievance machinery contained therein. Thus, Varnum possessed: (1) a cause of action against Nu-Car under Section 301 to enforce the terms of the collective bargaining agreement, and (2) a cause of action against the union if it did not fairly represent him in negotiating the change in the dispatch procedure. *Belknap* is clearly inapplicable given the facts of this case.

Contrary to the Eleventh Circuit's opinion herein, Varnum's state cause of action for fraud is preempted by Section 301 pursuant to *Lueck* and the Courts of Appeals' decisions cited above. His complaint was properly dismissed for failure to meet the prerequisites necessary for filing a Section 301 cause of action. *See DelCostello v. International Brotherhood of Teamsters,* 462 U.S. 151 (1983); *Hines v. Anchor Motor Freight, Inc.,* 424 U.S. 554 (1976); *Republic Steel Co. v. Maddox,* 379 U.S. 650 (1965).

Pending before this Court are two cases which raise the Section 301 preemption issue in different contexts. In *Hechler v. International Brotherhood of Electrical Work-*

ers, AFL-CIO, 772 F.2d 788 (11th Cir. 1985), *cert. granted,* 106 S. Ct. 1967 (1986), the 301 preemption issue is raised with respect to the plaintiff's state common law negligence suit against her *union. Williams v. Caterpillar Tractor Co.,* 786 F.2d 928 (9th Cir. 1986), *cert. granted,* 107 S. Ct. 455 (1986), raises the 301 preemption issue as it relates to the district court's removal jurisdiction under 28 U.S.C. Section 1441(a). The Section 301 preemption issue presented by the facts of this case is no less important. Certiorari is equally appropriate here.

II. THE APPELLATE COURT'S DECISION THAT RESPONDENT'S CAUSE OF ACTION FOR FRAUDULENT MISREPRESENTATION IS NOT PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT CONFLICTS WITH THIS COURT'S DECISION IN SAN DIEGO BUILDING TRADES COUNCIL v. GARMON, AND WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEALS APPLYING GARMON TO SIMILAR CASES.

The decision of the Appeals Court in this case directly conflicts with the Supreme Court's decision in *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959). In *Garmon,* the Court held that "state regulations and causes of action are presumptively pre-empted [by the exclusive jurisdiction of the National Labor Relations Board] if they concern conduct that is actually or arguably either prohibited or protected by the [National Labor Relations] Act." *Id.* at 245. Under *Garmon,* a state cause of action may be sustained if the behavior regulated is of only peripheral concern to the National Labor Relations Act or touches interests deeply rooted in local feeling and

responsibility. *Garmon* at 243-244. Generally, the state's interest in controlling the conduct in question is balanced against "both the interference with the National Labor Relations Board's ability to adjudicate controversies committed to it by the [National Labor Relations] Act (citations omitted), and the risk that the State will sanction conduct the Act protects." *Belknap, Inc. v. Hale*, 463 U.S. 491, 498-499.

In this case, the Eleventh Circuit held that Varnum's state fraud claim was not subject to the NLRA preemption doctrine set forth in *Garmon*. In this respect, the court did recognize that if Nu-Car were forced to disclose the pending dispatch proposal to Varnum, such action would constitute "direct dealing" prohibited under Section 9(a) of the National Labor Relations Act ("NLRA"), and would thus cause Varnum's claim to be preempted. (Appendix at page A8.) However, the Court avoided such a result by arguing that Varnum's claim did not place a duty on Nu-Car to disclose the dispatch proposal, but merely sought to prohibit Nu-Car from making the representations complained of (which were entirely consistent with the Labor Agreement) in the absence of such a disclosure. (Appendix at page A8.) Despite the apparent logic of the Court's reasoning on this point, as a practical matter the unavoidable effect of the Court's decision is to place a duty on employers to reveal contemplated collective bargaining proposals to prospective employees. Respondent's state fraud claim should, therefore, be subjected to NLRA preemption under *Garmon*.

Under the Appeals Court's reasoning, in order to avoid state law claims for fraud, employers are presented with two basic alternatives: (1) reveal contemplated bargaining proposals to prospective employees during pre-employ-

ment interviews, or (2) avoid making representations to prospective employees concerning the terms and conditions of their employment, even though such representations are entirely consistent with the existing terms of the collective bargaining agreement. With respect to the first alternative, revealing potential collective bargaining proposal to a prospective employee is in direct contravention of an employer's duty under Section 9(a) of the NLRA not to deal directly with individual employees, but rather to negotiate through the designated collective bargaining representative. (As stated above, this fact was recognized by the Appellate Court.) It is well established that an employer's failure to avoid "direct dealing" will give rise to a meritorious charge under Section 8 of the NLRA for bad faith bargaining. See *Medo Photo Supply Corp. v. NLRB,* 21 U.S. 678 (1944); *Ross Crane Rental,* 267 N.L.R.B. No. 50, 114 L.R.R.M. 1079 (1983); *Seneca Electric Company,* 265 N.L.R.B. No. 198, 112 L.R.R.M. 1272 (1982).

Moreover, in this case the District Court found that Nu-Car's representative, McAllister, merely had heard "rumors" concerning possible changes in the dispatch procedure. Indeed, as the concurring justice at the Appellate level astutely observed, the proposal to change the dispatch procedure was not made by Nu-Car but was made by the Union. (Appendix at page A11.) The proposal in question came in the form of a counter-demand made in response to Nu-Car's request for concessions relating to its obligation to make certain health, welfare, and pension contributions. Thus, the Appeals Court incorrectly characterized the situation when it found that Nu-Car did not inform Varnum of an "impending change" while inducing him to accept employment, and that Nu-Car was "planning to implement" a seniority-based dispatch

system. *Varnum v. Nu-Car.* (Appendix at page A7.) Clearly, unilateral implementation of a seniority dispatch system on Nu-Car's part would have constituted a violation of Section 8(a)(5) of the NLRA.

Nonetheless, even if it is assumed *arguendo* that the proposal to change the dispatch procedure was Nu-Car's *and* that it was contemplated at the time Varnum was being interviewed for employment, it was still merely a *proposal.* By definition, it could not be implemented without achieving the Union's agreement. Therefore, even if McAllister had knowledge of the proposal, it was impossible for him to predict whether it would become a part of the agreement through the course of negotiations with the Union. To the extent that the Appeals Court's decision would have required Nu-Car to reveal the dispatch proposal to Varnum, the decision conflicts with the Supreme Court's holding in *Garmon.*

As stated above, the Appeals Court found that Varnum's claim did not allege that Nu-Car had a duty to disclose the dispatch proposal. Rather, the Court stated that in the absence of disclosure Nu-Car should not have made pre-employment representations to Varnum, even though the representations were entirely consistent with the existing collective bargaining agreement. Obviously, the practical result of such a holding, is to create an utterly impossible situation for employers. Neither Nu-Car nor any other employer can hire employees without discussing the applicable terms and conditions of employment. Given the absolute necessity to discuss such terms and conditions, there is no way under the Appeals Court's decision to avoid the creation of a duty to reveal pending bargaining proposals to prospective employees. The Appeals Court's decision does create a duty to reveal pending proposals to prospective employees which violates Section 9(a) of the

NLRA. Therefore, the Eleventh Circuit incorrectly refused to apply the *Garmon* doctrine to this case.

The Eleventh Circuit's refusal to apply *Garmon* to this matter is also inconsistent with two Court of Appeals' decisions in which claims similar to Varnum's were found to be preempted by the NLRA. In *Serrano v. Jones & Laughlin Steel Co., LTV,* 790 F.2d 1279 (6th Cir. 1986), the Sixth Circuit upheld the district court's dismissal of plaintiff's state fraud claim against the employer, finding that such claim implicated potential violations by the employer of Section 8 of the NLRA. *Id.* at 1286. As such, plaintiff's fraud claim was not peripheral to the concerns of federal labor law, but rather struck at the heart of the employer's obligations under Section 8. *Serrano* at 1287. Significantly, the Court in *Serrano* had little difficulty in distinguishing the Supreme Court's holding in *Belknap.* Likewise, in *Moore v. General Motors Corp.,* 739 F.2d 311 (8th Cir. 1984), the Eighth Circuit found the plaintiff's state fraud and misrepresentation action against the employer to be preempted by the NLRA. There, as in this case, the plaintiff claimed that the employer knew at the time certain representations were made that they were not true. *Id.* at 313. Nonetheless, contrary to the Eleventh Circuit's decision in this matter, the Eighth Circuit upheld dismissal of the plaintiff's complaint as being preempted by *Garmon.*

The Appeals Court's decision in this case conflicts with *Garmon,* and with both the *Serrano* and *Moore* decisions described above.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

(Filed November 20, 1986)

No. 85-3898

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LARRY T. VARNUM,
Plaintiff-Appellant,

VS.

NU-CAR CARRIERS, INC.,
Defendant-Appellee.

Appeal From the United States District Court
For the Middle District of Florida

[804 F.2d 638]

[The Synopsis, Syllabi and Key Number Classification constitute no part of the opinion of the court.]

Former employee brought action against former employer alleging that employer had fraudulently misrepresented to him the conditions of employment in order to induce him to accept employment, and seeking compensatory and punitive damages. Following removal, the United States District Court for the Middle District of Florida, No. 84-1416-Civ-J-14, Susan H. Black, J., granted summary judgment for the employer. Employee appealed. The Court of Appeals, Johnson, Circuit Judge, held that:

(1) employee's claim was based upon employer's conduct prior to employee's accepting employment, and employee was not claiming that employer should have been required to do something prohibited under National Labor Relations Act, so that employee's claim was not preempted by Act, and (2) whether employer's hiring representative's representation to prospective employee that drivers for employer typically grossed $7,000 per month, actually was fraud was issue for trier of fact to decide.

Reversed and remanded.

Walter E. Hoffman, Senior District Judge, sitting by designation, concurred specially and filed an opinion.

1. States 18.45

Employee's complaint which was not addressed to common carrier/employer's seniority dispatch system itself, but rather to failure of employer to inform him of impending change from first-in-first-out basis of dispatch to seniority basis while inducing employee to accept employment, did not go to term of employment covered by collective bargaining agreement and in fact involved employer's conduct prior to employee's accepting employment, so that employee's fraud claim was not preempted by Labor Management Relations Act. Labor Management Relations Act, 1947, § 301, 29 U.S.C. A. § 185.

2. States 18.45

Employee, who did not claim that employer had duty to make disclosure that it was drafting proposed change in method of work allocation from first-in-first-out basis to seniority basis, but instead claimed that in absence of such disclosure, employer should not have told employee that he could earn $7,000 a month, was not claiming that

employer should have been required to do something prohibited under National Labor Relations Act, so that claim was not preempted by Act. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185; National Labor Relations Act, § 9(a), as amended, 29 U.S.C.A. § 159(a).

3. Fraud 64(3)

Whether employer's hiring representative's representation to prospective employee that drivers for employer typically grossed $7,000 per month actually was fraud, where employer knew, at time of representation, that company was planning change to dispatch system under which new drivers such as prospective employee, would earn substantially less, was issue for trier of fact to decide.

Before FAY and JOHNSON, *Circuit Judges and* HOFFMAN*, *Senior District Judge.*

JOHNSON, *Circuit Judge*:

This is an appeal from an order granting summary judgment to the defendant. We reverse.

I. BACKGROUND

Plaintiff-appellant Larry Varnum is a truck driver who sought employment with defendant-appellee Nu-Car Carriers, Inc., a common carrier engaged in the transport of new cars. In order to gain employment with Nu-Car, a trucker must purchase his own equipment, including a certain type of tractor-trailer not more than two years old, which equipment costs about $60,000. Appellant negotiated with a representative of appellee in May 1983 regarding employment. During their discussions, the representative

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*Honorable Walter E. Hoffman, Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

told appellant that appellee allocated work according to a first-in-first-out basis that provided equal work opportunities to truckers regardless of their seniority. Truckers were paid about 65% of the gross amount that Nu-Car received for each load the trucker transported; therefore, the truckers' income depended on the availability of loads to transport. The statement concerning the dispatch system was consistent with the collective bargaining agreement in effect at that time between Nu-Car and the union representing Nu-Car's employees.

The representative also showed appellant computer printouts that indicated that the average monthly gross income for truckers with Nu-Car, based on the past few months, had been about $7,000. The information contained in these printouts was correct.

While appellant was negotiating about employment with Nu-Car, Nu-Car was drafting a proposal to switch to a seniority-based dispatch system. Under this dispatch system, new loads would be assigned to the most senior trucker available. Since there were usually several truckers on hand at the time Nu-Car was needed to transport a load, this system would have a disastrous effect on the new truckers: it would have the effect of laying some of them off. The new system was partially designed to enable Nu-Car to save on the costs of health care, welfare, and pension benefits. Under the new system, Nu-Car would not be required to make a weekly contribution for health care, welfare, and pension benefits for any owner-operator who did not work during a particular week.

There is evidence that the representative for Nu-Car knew of the proposal during the employment negotiations, yet failed to inform appellant of the pending change. Deposition of Paul McAllister, at 37-39; affidavit of Paul

McAllister, at 1-2. More significantly, the representative knew that if the change was agreed to, his representation that appellant might earn $7,000 per month would be false.

After June 27, 1983, Nu-Car and the Union began to renegotiate the collective bargaining agreement. These negotiations resulted in a new agreement, concluded on about July 8, 1983, which included a change in the dispatch procedure to a seniority-based system.

Appellant began to work for Nu-Car on June 2, 1983. For his first one-and-a-half months of employment, he was dispatched under the first-in-first-out system. The new dispatch system was then put into effect, and Varnum's income fell sharply. Varnum resigned from Nu-Car in March 1984. At the time he resigned, Varnum had not filed any grievance under the machinery provided by the collective bargaining agreement.

In November 1984, Varnum filed a complaint against Nu-Car in Florida state court alleging that Nu-Car had fraudulently misrepresented to him the conditions of employment in order to induce him to accept employment. Varnum sought compensatory and punitive damages. In December 1984, Nu-Car removed the action to the United States District Court for the Middle District of Florida, based on diversity of citizenship.

In June 1985, Nu-Car moved for summary judgment on three grounds: (1) that the action was preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C.A. § 185 ("Section 301"), which authorizes suits between labor organizations and employers for breach of a collective bargaining agreement; (2) that the action was preempted by the National Labor Relations Act ("NLRA"); and (3) that, because of the nature of the collective bargaining process, Varnum cannot possibly show a *prima*

facie case of fraudulent misrepresentation. In late July 1985, Varnum filed a brief in response to Nu-Car's motion. A hearing on the motion was held in October 1985 before the district judge. At the conclusion of the hearing, the district judge orally ruled that the terms of Varnum's employment that were allegedly misrepresented were specifically addressed in the collective bargaining agreement. Therefore, the court held that Varnum's state law claim was preempted by Section 301 and granted summary judgment in favor of Nu-Car. However, the court gave Varnum 20 days in which to amend the complaint and allege misrepresentations with respect to subjects not covered in the collective bargaining agreement. Varnum did not amend the complaint, and he filed a timely notice of appeal from the order of the district court.

II. FRAUD CLAIM NOT PREEMPTED BY SECTION 301

The essence of appellant's complaint is that, because Nu-Car's representative knew that Nu-Car was planning to implement a seniority-based dispatch system, his representation that appellant could expect to gross about $7,000 per month was fraudulent. The district court found that the gravamen of appellant's complaint was about the change in the dispatch system. The court found that, because the terms of appellant's employment were established through the collective bargaining agreement, appellant's complaint related to the collective bargaining agreement itself. Therefore, the court found that appellant's state court claim was preempted by federal law. The district court relied upon *Eitmann v. New Orleans Public Service, Inc.*, 730 F.2d 359 (5th Cir.1984), in which the court held that where an employee who is covered by a collective bargaining agreement seeks to redress a grievance subject

to its terms, he must follow the procedures provided for in the collective bargaining agreement or seek a remedy under Section 301 for violation of that agreement.

[1] The district court misconstrued the essence of appellant's complaint. Appellant did not complain about the seniority dispatch system itself but, rather, complained about the failure of Nu-Car to inform him of the impending change while inducing him to accept employment. Thus, appellant's complaint did not go to a term of employment covered by the collective bargaining agreement. Instead, the complaint involved Nu-Car's conduct prior to appellant's accepting employment. Because the complaint focused on conduct that occurred prior to the plaintiff's accepting employment, the case is distinguishable from *Eitmann* and is not preempted by Section 301. *Cf. Belknap, Inc. v. Hale*, 463 U.S. 491, 509-511, 103 S.Ct. 3172, 3182-83, 77 L.Ed.2d 798 (state law action for misrepresentation by employees who had replaced strikers and were subsequently discharged, although the replacements had been told prior to their accepting employment that they would be "permanent replacements," was not preempted by federal labor laws).

III. FRAUD CLAIM NOT PREEMPTED BY NATIONAL LABOR RELATIONS ACT

Appellee's second argument as to why summary judgment was appropriate is that the NLRA preempts a fraud claim based on the failure of a company to disclose an impending change to a prospective employee, where the company has not yet proposed the change to the union. Specifically, appellee contends that to inform a prospective employee of the company's bargaining proposal to change to a seniority based dispatch system would have been "direct

dealing" which was prohibited under the Section 9(a) of the NLRA. Appellee argues that this state law action therefore seeks to regulate conduct which is prohibited, and thus preempted, by the NLRA.

[2] This argument would make sense if appellant's claim was that Nu-Car had a duty to disclose the fact that it was drafting a proposed change in the seniority system. However, appellant did not claim that Nu-Car had a duty to make such a disclosure; rather, appellant claimed that in the absence of such a disclosure Nu-Car should not have told him that he could earn $7,000 a month. Since appellant is not claiming that Nu-Car should have been required to do something prohibited under the NLRA, appellant's claim should not be preempted by that act.

IV. FRAUD CLAIM DOES NOT FAIL AS A MATTER OF LAW

Appellee's final argument is that Nu-Car's representations during negotiations with Varnum could not have been fraud as a matter of law. Appellee contends that prior to appellant's accepting employment with Nu-Car, the first-in-first-out dispatch system was in effect and Nu-Car could not have predicted with any certainty that the union and Nu-Car would agree on the proposed change to the seniority-based system.

[3] The evidence was uncontroverted that the dispatch system in effect during the employment negotiations was not seniority-based. However, there was deposition and affidavit testimony by Paul McAllister, the hiring representative for Nu-Car, indicating that at the time he negotiated with Varnum he knew of the company's plan to propose a change to a seniority-based system. The evidence thus shows that, at the time Nu-Car's representative

indicated to Varnum that drivers typically grossed $7,000 per month, he knew that the company was planning to propose a change to a dispatch system under which new drivers such as Varnum would earn substantially less. Under Florida law, this representation regarding what Varnum could expect to earn, in the absence of any disclosure regarding the impending change in the seniority system, could have been fraud. *See Hamlen v. Fairchild Industries, Inc.*, 413 So.2d 800, 801 (Fla. 1st Dist.Ct.App. 1982). Whether or not the representation actually was fraud is an issue for the trier of fact to decide.

V. CONCLUSION

For the reasons expressed above, the judgment of the district court granting summary judgment in favor of the defendant is REVERSED. This case is REMANDED for further proceedings.

HOFFMAN, *Senior District Judge*, concurring specially:

Daniel Webster once stated, "There is nothing so powerful as the truth, and nothing so strange."[1] This sentiment is particularly apropos in light of appellant's predicament. While I concur in the result reached by the court, I am compelled to express my concern that the scope of the majority's holding not be expansively interpreted. I concur on the grounds that, based on the affidavit of Paul McAllister, appellant's state law claim does not fail as a matter of law and that the state claim is not pre-empted by federal law.

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1. Edwin P. Whipple, *The Great Speeches and Orations of Daniel Webster*, 204 (1879). At the request of the government, Webster appeared for the prosecution and made this comment in the prosecution's closing argument in the murder trial of Captain Joseph White.

I.

Florida law is consistent with the general rule that an actionable misrepresentation must involve a false statement of a past or existing fact and not a promise to do something in the future. *Hamlen v. Fairchild Industries, Inc.*, 413 So.2d 800, 802 (Fla. 1st Dist.Ct.App.1982); *Vance v. Indian Hammock Hunt & Riding Club, Ltd.*, 403 So.2d 1367, 1371 (Fla. 4th Dist.Ct.App.1981). However, Florida law recognizes several exceptions to this rule. First, "a promise is actionable as fraud only when the promisor had a positive intent not to perform his promise, or made the promise without a present intent to perform it." *Bissett v. Ply-Gem Industries, Inc.*, 533 F.2d 142, 145 (5th Cir. 1976); *Perry v. Cosgrove*, 464 So.2d 664, 666 (Fla. 2d Dist. Ct.App.1985). Second, projections, opinions or representations of future profits or business success when made by a party with superior or exclusive knowledge of the underlying facts can constitute fraud when the "defendant knew or should have known, that the facts in his possession invalidated the opinion which he expressed." *Bissett*, 533 F.2d at 146 (applying Florida law of misrepresentation to allegedly false statements made to induce plaintiff to enter franchise agreement); *cf., Day v. Avery*, 548 F.2d 1018, 1025-28 (D.C. Cir.1976), *cert. denied*, 431 U.S. 908, 97 S.Ct. 1706, 52 L.Ed.2d 394 (1977) (generally discussing actionable misrepresentations involving statements of prospective returns made in order to induce those with inferior knowledge to enter into agreement).

Because projections of future performance are subject to the uncontrollable economic influence of the marketplace, such projections are generally considered expectations or predictions and not ironclad guarantees, regardless of their persuasive effect. *Kelly Tire Service, Inc. v. Kelly-*

Springfield Tire Co., 338 F.2d 248, 253 (8th Cir.1964). Clearly, however, presentation of false projections of business performance would fall within actionable misrepresentation under Florida law as a false statement of past fact. Further, substantial discrepancies between profit and loss statements presented to induce plaintiff to enter into a franchise agreement and the actual performance records of other franchises may reasonably support the inference that the defendant had knowledge of facts which would prevent the attainment of the projections. *Bissett*, 533 F.2d at 148.

This case does not involve conduct as egregious as the intentional manipulation of representations of projected revenues in order to overstate income. During the 20-odd meetings during the month of May, McAllister accurately represented to Varnum the existing terms of employment which governed his employment from June 2, 1983 (date of employment) to July 13, 1983 (date of implementation of the seniority based dispatch system). Throughout this one and one-half month period, appellant 1) was dispatched on a "first in-first out" system, 2) remained home-based in Jacksonville and 3) earned revenues comparable with the projections. McAllister's statements did not become inaccurate until the change in the collective bargaining agreement on or about June 26, 1983, at which time appellant was a Nu-Car employee and a provisional member of the union. Presumably, at this juncture any complaint by Varnum involving the change in dispatch system should have been brought pursuant to the grievance procedures established in the collective bargaining agreement. It should be noted that during the collective bargaining negotiations, as a response to Nu-Car's desire to reduce the cost of employee health care and pension benefits, the union, and not Nu-Car, initiated the suggestion

to change the dispatch system. Further, in most instances it would be difficult to attribute a quantifiable degree of knowledge of a possible change in the collective bargaining agreement to an employee not involved in the bargaining sessions. Consequently, under these circumstances, summary judgment would appear proper because the misrepresentation claim would fail as a matter of law and the collective bargaining agreement would afford a remedy.

Florida courts have been reluctant to grant summary judgment when fraud or misrepresentation is involved. *Elmore v. Vatrano,* 485 So.2d 888 (Fla. 1st Dist.Ct.App. 1986). The court in *Elmore* noted at 890:

> Summary judgment is not a substitute for a trial; and fraud is a subtle thing requiring full explanation of the facts and circumstances of the alleged wrong to determine if they collectively constitute fraud. Since the whole context is necessary for the determination, it is seldom that one can determine the presence or absence of fraud without a trial. *Alepgo Corp. v. Pozin,* 114 So.2d 645 (Fla. 3d Dist.Ct.App.1959).

If the statements made by McAllister during May concerning the terms of Varnum's employment were made with actual knowledge of the fact that the dispatch system was to be changed or that Nu-Car intended to engage in a course of conduct which would prevent the realization of the representations made to Varnum, then the state tort action accrued when the statements were made and prior to the employment relationship. Consequently, viewing the facts in a light most favorable to appellant, there exists some doubt as to the extent of McAllister's knowledge during the month of May of the certainty of the change to the seniority based dispatch system. Particularly, I rely on the statement in McAllister's affidavit dated April 11,

1985, to the effect that McAllister was aware of discussion within the company concerning a shift to the seniority system and that he did not disclose this information because he was under pressure to hire a certain number of owner-operators.

Although there is no affirmative duty in Florida to disclose possible future changes in the terms and conditions of employment, an employer may not represent terms of an employment agreement when the employer has a present intent not to perform the terms under the agreement, or has knowledge of facts which will prevent the bargained for agreement from being performed. Because there is some evidence which suggests that Nu-Car may have had either the intent not to employ appellant under the bargained for terms or knowledge of facts which would materially alter what was represented to appellant, the state law claim does not fail, but should be resolved by the trier of fact.

II.

The close question in this case is whether Section 301 pre-empts appellant's state law claim. The court below ruled that because the terms of appellant's employment were specifically addressed in the collective bargaining agreement, his proper remedies were under the contract grievance procedure and 29 U.S.C. § 185 (Section 301), and that Section 301 pre-empted the state law claim. In reversing the district court, I am concerned that the opinion not be broadly construed to open the floodgates to a myriad of state law actions in an area where federal law is paramount. The holding does not chip away at the pre-emptive effect of Section 301, but rather, on its particular facts falls outside of the established parameters of Section 301.

I do not believe that permitting appellant's state law claim to proceed would be inconsistent with these established parameters. "Pre-emption cases in the labor area are often difficult because we must decide the questions presented without any clear guidance from Congress." *Belknap, Inc. v. Hale,* 463 U.S. 491, 523, 103 S.Ct. 3172, 3190, 77 L.Ed.2d 798 (1983) (Brennan, J., dissenting). Thus, "[t]he full scope of the pre-emptive effect of federal labor-contract law remains to be fleshed out on a case-by-case basis." *Allis-Chalmers v. Lueck,* 471 U.S. 202, ..., 105 S.Ct. 1904, 1916, 85 L.Ed.2d 206 (1985). The novel facts present here test the scope of the pre-emptive effect of federal labor law by questioning whether the employment relationship incorporates all statements made by an employer, even if the employee has not yet been formally employed. In *Teamsters Local v. Lucas Flour Co.,* 369 U.S. 95, 103, 82 S.Ct. 571, 576, 7 L.Ed.2d 593 (1962), the Court stated:

> The dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute. Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of [*Textile Workers Union v.*] *Lincoln Mills* [353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957)] requiring issues raised in suits of a kind covered by § 301 to be decided according to the precepts of federal labor policy.

More recently in *Lueck,* 471 U.S. at ....., 105 S.Ct. at 1911, the Court echoed the principle of *Lucas Flour,* when it noted:

> If the policies that animate § 301 are to be given their proper range, however, the pre-emptive effect of

> § 301 must extend beyond suits alleging contract violations. These policies require that 'the relationships created by [a collective bargaining] agreement' be defined by application of 'an evolving federal common law grounded in national labor policy.' *Bowen v. United States Postal Service,* 459 U.S. 212, 224-225, 103 S.Ct. 588, 596, 74 L.Ed.2d 402 (1983).

The Court suggests the pre-emptive effect be paramount in the area covered by the statute, but recognizes that not every dispute involving a collective bargaining agreement is necessarily pre-empted. *Id.*

The district court relied heavily on *Eitmann v. New Orleans Public Service, Inc.,* 730 F.2d 359 (5th Cir.1984), *cert. denied,* 469 U.S. 1018, 105 S.Ct. 433, 83 L.Ed.2d 359 (1984), in granting summary judgment. In *Eitmann,* defendant New Orleans Public Service, Inc. (NOPSI) explained prior to employing plaintiff that, because of the hazardous work conditions, plaintiff would receive full compensation during periods of disability caused by work related injury. Upon discharge as a result of an on-the-job injury, plaintiff brought suit, not upon the collective bargaining agreement between his union and NOPSI, but on an alleged breach of an independent agreement between himself and NOPSI, which included the agreement to pay full compensation. The Fifth Circuit ruled that the breach of contract claim was subsumed in the terms of the collective bargaining agreement, because the collective bargaining agreement provided for a grievance procedure for discharged employees claiming unjust dismissal. *Id.,* at 363. The court concluded that the collective bargaining agreement governed the avenue of remedy since plaintiff sought "redress for a grievance awardable by the arbitrator." *Id.,* at 364.

Appellant's claim in this case focuses upon the conduct of Nu-Car prior to signing the Leased Equipment Agreement on June 2, 1983, at which time he became an owner-operator. Unlike *Eitmann,* appellant's complaint centers upon representations of the terms of employment made by the employer which the employer allegedly knew were not true, and not a failure by the employer to adhere to established terms of the collective bargaining agreement. The difference in these circumstances is that here the wrong was committed prior to the employment relationship, while in *Eitmann* the wrong occurred when NOPSI allegedly failed to pay full compensation.[2] Therefore, in *Eitmann* the grievance procedure anticipates resolution of conflicts when parties to the collective bargaining agreement fail to perform under the established terms, but here arbitration is inadequate because the alleged misrepresentation involves conduct which does not arise under the terms and conditions of the collective bargaining agreement.

"The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen could not wholly anticipate." *Steelworkers v. Warrior & Gulf Co.,* 363 U.S. 574, 578, 80 S.Ct. 1347, 1351, 4 L.Ed.2d 1409 (1960). In *Republic Steel v. Maddox,* 379

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2. This is not to say that I perceive § 301 to pre-empt state law actions only when breach of contract is involved. Rather, as the Supreme Court recently noted in *Allis-Chalmers Corporation v. Lueck,* 471 U.S. 202, ..., 105 S.Ct. 1904, 1912, 85 L.Ed.2d 206 (1985), "In extending the pre-emptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." However, rejecting the state law bad faith handling of an insurance claim, the Court in *Lueck* determined that evaluation of that state law tort was inextricably intertwined with consideration of the terms of the labor contract and, therefore, was pre-empted by Section 301.

U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965), the Court rejected respondent's argument that because he had been discharged, the employment relationship had terminated and state law applies. While the Court intimates that the relationship continues after employment has terminated, the Court's holding is justified because it prevents a disgruntled, discharged employee from sidestepping the available grievance procedure and undermining the method for orderly settlement of employee grievances. *Id.* at 653, 85 S.Ct. at 616. However, despite the apparent breadth of the employment relationship under a collective bargaining agreement, I remain unconvinced that this collective bargaining agreement would encompass the activity complained of here and that the grievance procedure set out in the agreement would adequately redress the alleged harm. By not extending the employment relationship to include representations made by the employer to prospective employees, we do not undermine the established parameters of Section 301 because the alleged wrongful activity deals with misrepresentation of the terms of the collective bargaining agreement and not the change in the terms of the labor contract resulting from the negotiations between Nu-Car and the Union.

The Supreme Court also acknowledges an exception to the rule of uniform labor policies when the state claim is "of only peripheral concern to the federal law or touches interests deeply rooted in local feeling and responsibility." *Belknap,* 463 U.S. at 498, 103 S.Ct. at 3177. In *Belknap,* replacement employees, who were promised permanent employment in filling the position of striking employees brought suit against the employers for breaching the representation of permanent employment when the striking employees were subsequently rehired.

Consistent with other cases which address claims tangentially related to national labor policy, the Court permitted the state law claim to proceed because "maintaining the misrepresentation action would not interfere with the [National Labor Relations] Board's determination of matters within its jurisdiction . . ." and the state "surely has a substantial interest in protecting its citizens from misrepresentations that have caused them grievous harm."[3] *Id.* at 511, 103 S.Ct. at 3183. Here, adjudication of the state law misrepresentation claim will not jeopardize uniform determination of national labor policy, because the claim is only of peripheral concern to the federal regulatory scheme, and will afford relief for an interest protected in local feeling.

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3. The Court in *Belknap, Inc. v. Hale*, 463 U.S. 491, 509-510, 103 S.Ct. 3172, 3182-83, 77 L.Ed.2d 798 (1983), supports this proposition based on a line of cases which follow from *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), by citing *Linn v. Plant Guard Workers*, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966) (false and malicious statements which were injurious to reputation actionable under state law not pre-empted even if an unfair labor practice); *Farmer v. Carpenters*, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977) (intentional infliction of emotional distress not pre-empted although conduct might arguably have constituted an unfair labor practice); *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978) (state trespass action not pre-empted because it concerned objection to location of the picketing and not the picketing itself). In *Eitmann v. New Orleans Public Service, Inc.*, 730 F.2d 359, 364 (1984), *cert. denied*, 469 U.S. 1018, 105 S.Ct. 433, 83 L.Ed.2d 359 (1984), the Fifth Circuit approvingly cites the same cases as those above and adds *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 25 n. 28, 103 S.Ct. 2841, 2854, n. 28, 77 L.Ed.2d 420 (1983) (dictum suggesting battery suit arising from a violent strike not pre-empted).

JUDGMENT ENTRY OF THE UNITED STATES DISTRICT COURT

(Filed October 22, 1985)

Case Number: 84-1416-Civ-J-14

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

LARRY T. VARNUM

v.

NU-CAR CARRIERS, INC.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial on hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Summary Judgment is entered in favor of Defendant, NU-CAR CARRIERS, INC., and against Plaintiff, LARRY T. VARNUM.

TRANSCRIPT OF MOTION FOR SUMMARY JUDGMENT ANNOUNCING THE DECISION OF THE UNITED STATES DISTRICT COURT

(October 22, 1985)

Case No. 84-1416-Civ-J-14

[1] UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

LARRY T. VARNUM,
vs
NU-CAR CARRIERS, INC.,
Defendant.

TRANSCRIPT OF MOTION FOR SUMMARY JUDGMENT
before
THE HONORABLE SUSAN H. BLACK
United States District Judge

APPEARANCES:

For the Plaintiff: JOHN W. PAFFORD, Esquire

For the Defendant: MARK V. YOUNG, Esquire

Per FRAP 20(7), pp. 36-37 of the transcript of Motion for Summary Judgment contains findings of fact and conclusions of law delivered orally by the Court.

[2] The Clerk: Case No. 84-1416-Civ-J-14, Larry T. Varnum versus Nu-Car Carriers. Counsel for the plaintiff John W. Pafford; counsel for the defendant Mark Young.

The Court: I'll give you a few minutes. I know it's about five minutes before the hearing was supposed to start. I'll give you a minute to unpack your bags, and we'll begin.

Perhaps if you could both introduce yourselves for the record.

Mr. Pafford: For the record, John W. Pafford, and I'm attorney of record for the plaintiff Mr. Larry T. Varnum.

Mr. Young: Mark Young of the law firm of Smith and Hulsey, attorneys for the defendant Nu-Car Carriers, Inc.

The Court: Thank you.

The case is set on counsel for the defendant's motion. If you would proceed with your argument.

Mr. Young: Thank you, Your Honor.

May it please the Court. Plaintiff, a former employee of Nu-Car, has brought the state law cause of action of fraudulent misrepresentation against Nu-Car based on alleged representations made during the interview process regarding [3] the terms and conditions of his employment with Nu-Car.

Nu-Car filed this Motion to Dismiss and for Summary Judgment on the grounds that plaintiff's cause of action is pre-empted by Federal law, and it should have been brought under Section 301 of the Labor Management Relations Act. The applicable limitations for a Section 301 actions expired prior to the filing of this complaint, and the uncontradicted evidence before the Court in any event establishes that Nu-Car did not misrepresent to Varnum the terms of his employment.

The complaint in this case does not mention the material collective bargaining agreement in existence, and therefore raised a number of seemingly difficult factual issues. However, the briefs filed by the parties in this motion, together with supporting affidavits and depositions and exhibits, greatly simplify this case in that they establish the following material facts to which there is no genuine issue. Your Honor, I'll be referring to the Collective Bargaining Agreement, specific provisions are attached to our Exhibit 1 to our brief.

Since 1973, its material facts I'm referring to now, all owner-operator positions at Nu-Car's Jacksonville terminal have been included in the bargaining unit exclusively represented by the Teamsters Union. Plaintiff was employeed by Nu-Car from June 2nd, 1983 until March 12, [4] 1984 as an independent owner-operator and throughout that period of time there was a collective bargaining agreement in effect between Nu-Car and the Teamsters that governed the terms and conditions of plaintiff's employment.

Prior to the time the plaintiff became employed by Nu-Car he was told that he would be dispatched on the first-in-first-out basis. The dispatch procedure, Your Honor, is explained in detail in our brief. The important point is just that it was represented he would be dispatched on the first-in-first-out.

The collective bargaining agreement in effect provided for first-in-first-out dispatch at the time and in fact plaintiff was dispatched under that system for the first month and a half that he was employed by Nu-Car.

Prior to the time plaintiff was employed by Nu-Car he was told that he would be primarily based in Jacksonville. This was consistent with the collective bargaining

agreement in effect at that time and in effect while he was employed which provided that drivers could be required to pick up loads at terminals other than their home terminals on a single-trip basis only.

Nu-Car began negotiating sometime after June 27th, 1982, almost a month after plaintiff came to work with the Teamsters Union, plaintiff's agent under Section 9 of the National Labor Relations Act, and therefore, the legal [5] equivalent of the plaintiff himself. Those negotiations resulted in modification to the collective bargaining agreement. Specifically the dispatch procedure was changed from a first-in-first-out to a seniority basis.

Nu-Car and the Teamsters Union agreed to the collective bargaining for a change in the dispatch system sometime after July 7th, 1983, well over a month after plaintiff came to work for the employer. At no time did plaintiff resort to the grievance issue set forth in the collective bargaining agreement with respect to the change in the dispatch system or any of the events underlying his complaint.

Plaintiff resigned his employment with Nu-Car on March 12th, 1984, and the complaint in the action was filed November 21st, 1984, more than eight months after the plaintiff resigned and more than sixteen months after the change to seniority dispatch.

We're dealing in this complaint with primarily two representations. The first one dealing with the home base of the plaintiff. The company would point out that what the plaintiff was allegedly told was exactly what the collective bargaining agreement says. If Nu-Car required plaintiff to do otherwise, anything inconsistent with the collective bargaining agreement, it would have constituted a breach of that agreement, and plaintiff's proper avenue

would have been the contractual grievance procedure provided for in the [6] collective bargaining agreement and then a Section 301 suit for breach of contract.

More importantly the second representation involved in this complaint is that of seniority dispatch, the change in the dispatch first-in-first-out to seniority. Plaintiff in his brief refers to this as the gravamen of his complaint, and he concedes on the bottom of pages 4 and 6 that this change was the reason the plaintiff did not earn the income he expected.

As a matter of law, Your Honor, due to the very nature of the collective bargaining process as provided for in Sections 8 and 9 of the National Labor Relations Act, Nu-Car could not have known of the change in the dispatch procedure until it was agreed to by the union because Nu-Car did not have the right to unilaterally make such a change while the collective bargaining agreement was in effect.

In fact, the affidavit of Bruce Jackson, attached as an exhibit to our brief, which is uncontroverted, shows that it was the union that proposed the change approximately one month after the plaintiff was employed.

Plaintiff's only cause of action rising out of the change in the dispatch rules would have been either that by agreeing to the change Nu-Car Carriers breached the existing collective bargaining agreement; therefore, plaintiff's action would have been under Section 301 of the National [7] Labor Relations Act or that the union unfairly represented plaintiff in proposing and agreeing to a change that negatively impacted the plaintiff, and his cause of action in that case would have been the breach of the union's duty of fair representation, again under Section 301.

The point is, Your Honor, that the rights that the plaintiff asserts in this action, that he had an expectation to be home based in Jacksonville, to be dispatched on the first-in-first-out basis, are rooted in the collective bargaining agreement. Questions relating to the meaning and consequences of the collective bargaining agreement must be resolved by Federal law, and the proper cause of action Section 301. Parties cannot evade the requirements of Section 301 by relabeling their contract claims as state torts.

Plaintiff asserts that our Federal labor laws do not pre-empt this action because the representations were made prior to the time he was an employee of Nu-Car. It's already shown in the material facts, Your Honor, this is not a material fact because the representations were true at the time they were made, prior to plaintiff was employed, and the act that plaintiff is complaining of occurred after he was employed, that is the change in the dispatch system.

However, the Fifth Circuit dealt with the case in which an employee was complaining of representations to him prior [8] to the time he was employed, the case of Eitmann versus New Orleans Public Service, Inc. In that case there was an employee covered by the collective bargaining agreement, and he claimed he was entitled to something promised to him before he became employed.

The Court: Why don't you just go ahead and distinguish Belknap at this point.

Mr. Young: Yes, Your Honor. The Belknap case, Your Honor, which plaintiff also argues supports his complaint in this case is clearly distinguishable on the facts of this case. Belknap involved an economic strike in a labor

dispute during contract negotiations, and the first distinction is that there was no collective bargaining agreement in effect at the time of the action in Belknap.

The employer in Belknap hired permanent replacements to replace the economic strikers, and the strikers filed an unfair labor practice charge.

The National Labor Relations Board issued a complaint on that charge, and the parties entered into settlement negotiations, and as a part of that settlement Belknap agreed with the National Labor Relations Board that it would allow the strikers to come back to their jobs, thereby displacing the permanent replacements.

So in Belknap the primary distinguishing factors that we're dealing with three different groups, competing groups. [9] One is the employer, two is the strikers and three is the strike replacements. The strike replacements sued under state law, and it was held that their action was not pre-empted because in such a situation, although the act of Belknap in promising permanent jobs to the replacements may have been unfair labor practice, the focus of the Federal labor laws and the National Labor Relations Board would have been on the rights of the strikers to return to their jobs, which is necessarily conflicting with this group of permanent replacements.

Contrary to Belknap, in this case, Your Honor, we have only two parties, Nu-Car Carriers and the union which is plaintiff's agent.

As the Court is probably aware, the Supreme Court recently decided that Section 301 pre-empts the case of Allis-Chalmers versus Lueck. The principles in that case that the United States Supreme Court restated from its prior cases are directly applicable to this case. In

Allis-Chalmers plaintiff Lueck alleged that the tort, the breach of the duty of good faith in dealing with his insurance claim, an insurance claim that arose only from his insurance coverage under the collective bargaining agreement. The Supreme Court said in determining whether the claim would be pre-empted by Section 301, "The focus is whether the evaluation of the tort claim is inextricably intertwined with [10] consideration of the terms of the labor contract." And in that case it held that it was, and that the claim to breach the duty in good faith was pre-empted by 301.

In analyzing that claim, the Supreme Court focused on the fact that Mr. Lueck claimed that his right was breached to be dealt with in good faith, but as to what? As to a right that he had only under the collective bargaining agreement, his insurance coverage.

In the present case the plaintiff is claiming his right not to be fraudulently misled, but misled as to what? As to home base and dispatch rules, rights that arose under cover of the collective bargaining agreement.

In evaluating the elements of the plaintiff on his claims of fraudulent misrepresentation, it's necessary to look at three elements of that claim. What was said to the plaintiff; why it was said; and whether it was true when it was said.

What was said, Your Honor, was that the plaintiff would be home based in Jacksonville, and that he would be dispatched on the first-in-first-out basis. The reason it was said is because that's what the collective bargaining agreement said. It was consistent with the terms of the agreement.

Whether it was true or not, to determine that you have to look to the collective bargaining agreement which

[11] necessarily dictates the terms and conditions of employment under the National Labor Relations Act. Therefore, Your Honor, in the present case, as in Allis-Chalmers, the evaluation of Mr. Varnum's tort claim is inextricably intertwined with consideration of the terms of the labor contract.

Would the Court like me to go back and discuss the case of Eitmann?

The Court: It might be better to hear counsel's view on the case and then hear your comments in response.

Mr. Young: Let me make one brief point, Your Honor. The point of the whole motion is that this action should have been brought under Section 301. Plaintiff has failed to meet the statutory three conditions to 301 because he failed to exhaust his contractual grievance procedures that were provided for in the collective bargaining agreement, and this action was filed outside of the six month statute of limitations applicable to the 301 suits.

The Court: Thank you, Mr. Young. Mr. Pafford.

Mr. Pafford: Thank you, Your Honor.

The Court: Perhaps if you would start with Eitmann.

Mr. Pafford: Excuse me, Your Honor?

The Court: If you could begin with Eitmann and tell me why this case is different.

[12] Mr. Pafford: May it please the Court, Your Honor.

If I understand the Eitmann decision as argued by defense counsel in his brief, the one basic fundamental difference that would distinguish its holding from this present set of facts is here Mr. Eitmann is arguing that he has a

contractual right or agreement which far exceeds the collective bargaining agreement that was in existence at the time he was employed.

Now, in this set of facts that we have before the Court, we are not arguing or pressing a violation of the collective bargaining agreement. Instead, we are talking about a tort action of fraudulent representations perpetrated by the employer prior to any membership in any union which is documented not only in the depositions that we have submitted but also in defendant's counsel's depositions and affidavits.

The Court: Tell me the documentation.

Mr. Pafford: All right, Your Honor. I refer to it in our brief, the plaintiff's brief, the deposition of Mr. McAllister.

The Court: Mr. McAllister said that he was not aware of the possible changes in the dispatch system, but that he had heard of rumors. But does it really make any difference what he said? Could he have known what was going to happen in the collective bargaining?

Mr. Pafford: I beg the Court's indulgence. I [13] misunderstood the Court's question. Is the Court asking—

The Court: Let's say that Mr. McAllister said, you know, I figured out all along—let's assume for the sake of argument that there might be a real change in the dispatch system, but could he have ever known what was going to happen in collective bargaining?

Mr. Pafford: Could Mr. Varnum or McAllister?

The Court: Could Mr. McAllister have ever known?

Mr. Pafford: Your Honor, I submit yes.

The Court: How?

Mr. Pafford: We're not just taking this case in an utter vacuum, in other words asking that question and saying, how could he possibly get into his head and find out. We have to look at the surrounding facts that he testified to and also the surrounding facts that are incorporated in the affidavits of Van Fletcher and Mr. Leary, that at that particular time Nu-Car was undergoing financial problems. It was beneficial and almost mandatory to Nu-Car that they maintain on that lot, that they have a ready, available supply of drivers, owner-operators, if you will, at any cost.

Now, whether the seniority system changed, as Mr. McAllister testified, if it changed, it would totally ruin any chance he would have to bring on new drivers because a new driver would have the largest mortgage payments, and he would not have the opportunity as would an older driver, who [14] had lower payments by virtue of the fact he had been paying for his truck for a long period of time, his rig.

The Court: And it was in Mr. McAllister's interest to hire your client?

Mr. Pafford: Therefore, Nu-Car's interest.

The Court: Fine. I still don't—the question still is, how could Nu-Car have known what was going to happen in the collective bargaining that took place later?

Mr. Pafford: Your Honor, I'm recalling from the deposition that I sat through and the deposition that I read, that there was discussions, I believe Mr. McAllister—I cannot cite the Court to the particular page—but there was discussions in other—the correct term would be—I want to say plans—but in other places throughout the na-

tion that the seniority system was coming back in and was in effect, but was not at this particular time in effect in Jacksonville.

The Court: Page 38, he had heard rumors and—

Mr. Pafford: Thank you, Your Honor.

The Court: And he knew—he had heard of it, but how could he know what was going to happen? How could he know anything other than rumors? Just by the virtue of the nature of collective bargaining itself, how could he have known?

Mr. Pafford: I believe he also testified, Your [15] Honor, to his experience in the industry. Now, in the industry of providing car carriers, he's also aware, based on what the Court has read, that he was aware of it in other cities, and that it was a coming thing. He did not know—I don't know if he ever testified that he knew exactly when it would reach Jacksonville. But the point is, without that—if he would have turned over—I believe we can readily admit if he would have said to any new owner-operator, we are going to be based on the seniority dispatch system, there would not be any Nu-Car Carriers, any new owner-operators available.

The Court: How could he have said it when he was negotiating with your client?

Mr. Pafford: Also I believe his affidavit says that he's under pressure to provide those drivers.

The Court: How could he have said it?

Mr. Pafford: How could he have said it? If Mr. Varnum at that particular time—let's change the scenario of facts—had come to him and made the inquiries.

The Court: He could not have truthfully said at that time that he knew that was going to happen, could he?

Mr. Pafford: Your Honor, he could have made him aware.

The Court: Of the rumors?

Mr. Pafford: Of those rumors. Now, we're talking [16] about why is this so critical. Because the facts show the great expense one must have in order to become an owner-operator.

The Court: I will agree that your client has a very sad story to tell; I'll agree with that. And it's very, very sad, but I don't see a distinction between your client's case and Eitmann at this point. I'm grasping to try to find that.

Mr. Pafford: All right, Your Honor. May I respond and analogize those two cases?

The Court: Yes.

Mr. Pafford: In Eitmann, E-i-t-m-a-n-n, the facts show a conversation or agreement allegedly between the prospective employee and an employer. What is this agreement that forms the basis? It is—and I answer the question—that he should receive something more than that provided by the collective bargaining agreement in effect at that time.

Now, in the Varnum case there is no question that his—there is no question we're talking about a collective bargaining agreement because Mr. Varnum is not even an employee discussing what is available under the collective bargaining agreement as Mr. Eitmann is. Now, Mr. Eitmann is not an employee, I will grant the argument that,

but he is talking about now I have so much available to me, so many provisions under this collective bargaining agreement. I want this extra provision. That brings into play the [17] collective bargaining agreement by the plaintiff. In that case by filing the suit says, I'm trying to get this over and above the collective bargaining agreement. We're not talking about a collective bargaining agreement in Varnum.

Quoting from that same opinion—

The Court: But didn't he join the union after his employment began?

Mr. Pafford: Absolutely, Your Honor, at some time after, he did join the union, but as counsel argued to the Court, the acts complained of, and counsel argues and I respectfully disagree with counsel, the acts complained of are not violations of the collective bargaining agreement that were changed at the time that he was a member of the union.

Instead the plaintiff is arguing well prior to and before becoming even an employee, becoming a member of the union, the acts complained of occurred. That's where we ask the Court to focus its attention. That's where the misrepresentations were made.

The Court: What misrepresentations?

Mr. Pafford: Representations as outlined, Your Honor, are that he would receive, the plaintiff, if he purchased this fifty or sixty thousand dollars worth of equipment in a tractor, he would be able to gross in the neighborhood of $7,000 a month. The next factor most [18] critical, that he would be dispatched on a first-in-first-out basis, and that he would be home based in Jacksonville.

The Court: Wasn't that true at the time, that the employer could make that representation that he could be dispatched on the first-in-first-out basis?

Mr. Pafford: At that particular time, yes, Your Honor.

The Court: And that didn't change until after he became employed, and he joined the union?

Mr. Pafford: That's correct, Your Honor, but at no time was Mr. Varnum able to be privy to this information of these rumors as testified to by Mr. McAllister, as confirmed by the other affidavits in the file, that a change was forthcoming.

Now, that in and of itself and I would ask the Court to take into consideration one other aspect. That at that particular time Mr. McAllister was under pressure, if you will, by Nu-Car to supply this fleet of owner-operators readily available to Nu-Car, so if they received a large volume of business, they would have the facilities to handle it.

Mr. McAllister said, I had to do it. He said in his affidavit that Mr. Varnum was a victim of circumstances, that there is no way possible he could have known what I knew, and I couldn't tell him because in effect—and I'm not quoting [19] Mr. McAllister; I'm paraphrasing it—my neck would have been on the line. I had to produce these drivers.

Taking all of those facts together, Your Honor, is where I see—and I'm asking the Court to see—that, yes, Mr. McAllister knew of this. Yes, Mr. McAllister intentionally didn't tell him the facts involved here in order that he could have an owner-operator.

The Court: So you think that he had a duty to tell your client of the rumors concerning the possible changes in the collective bargaining contract between the employer and the employees?

Mr. Pafford: Yes, Your Honor, taking into consideration the gross expense that was about to be made or had to be made. As all parties agree, you have to have the truck, you have to have the right, and it has to be outfitted according to Nu-Car's specifications.

More so than that, Your Honor, without putting that seniority dispatch in effect, would leave any, Mr. Varnum or any Nu-Car operator that's new, a rookie if you will, would never get the available driving, would never get the loads.

Your Honor has asked questions, and I've attempted to respond to them in reference to Eitmann. On page 364, this is 730 F.2d, 364, the Court there cites Belknap and how it would apply or not apply under those facts. And the Court says, "The focus of these determinations, however, would be [20] on whether the rights of the strikers were being infringed. Neither controversy would have anything in common with the question whether Belknap made misrepresentations to replacements that were actionable under state law. The board. . ."—speaking of the National Labor Relations Board— ". . . would be concerned with the impact on the strikers, not with whether the employer deceived replacements."

Analogizing this to Varnum, I submit the Board would not [sic] be concerned with the impact on the collective bargaining agreement or the union, not with whether the employer deceived Mr. Varnum.

The Court: Well, in Belknap through really isn't the reason, the underlying reason is that there was no one around to represent those permanent replacements; that they were not a part of any collective bargaining contract; and they were sort of left out on a limb.

How is Mr. Varnum in that same position? He was a party to the collective bargaining contract, and he had a Section 301 cause of action.

Mr. Pafford: We would submit, Your Honor, that he would be identical to the strikers because the acts complained of by Mr. Varnum, the misrepresentations by the employer, occurred at a time when he was not an employee of Nu-Car, and more importantly when he was not a member of the collective bargaining agreement.

[21] There is no way, Your Honor, that he could argue, changing the facts if you will, that the misrepresentations, I was now told by Mr. McAllister at this subsequent point in time when I'm a member of the union. Conversely, they would say, when did the misrepresentations occur? Well, before I hired on, as the deposition has stated, I was told this. Well, you weren't a member of the union at that time and a member of the collective bargaining agreement. I would submit that's correct.

Once again the focus of attention is not, the representations we're not saying occurred when he was a member of the union or an employee but instead prior to.

The Court: What he was told was the truth before he was hired. He just wasn't told about the rumors.

Mr. Pafford: Rumors would be a slight term to use, Your Honor. We're saying in this case it was the death knell; it would have turned—this case would never have come into existence because as Mr. Varnum testified, he

never would have bought the rig or asked to become an employee of Nu-Car.

That rumor, that change of policy, not just the seniority dispatch but the income, the other affidavits that we've submitted by other drivers of Nu-Car saying in effect you're asking for pie in the sky for $7,000, and that didn't exist. That didn't exist at that particular time. Yet Mr. [22] McAllister said in his deposition and his affidavit, I had to show him.

Now, what did he show? And I know the Court has been focusing on the seniority dispatch system, but the other element we're claiming, the other misrepresentation was to income. I showed him a sheet of other Nu-Car drivers and what they had made. I knew at the time I made it, at the time I represented and showed it to Mr. Varnum that he was not well versed in this type of trucking industry. But I was in effect—and I'm paraphrasing—under the gun to bring on more Nu-Car carriers, more owner-operators. And he misrepresented that fact, knowing it was false.

The Court: What fact?

Mr. Pafford: The income, speaking of the income, Your Honor, by showing this is—excuse me, I didn't mean to interrupt the Court.

The Court: No, go ahead.

Mr. Pafford: By showing this in an attempt to lead Mr. Varnum into believing that he could make $7,000. And he didn't make $7,000; it's unrefuted at this point.

The Court: Well, isn't the reason because of the change in the seniority system?

Mr. Pafford: That is one of the reasons, yes, Your Honor. But it's also in the other affidavits because I wanted to cover all the facts that we're claiming, the other [23] drivers, Mr. Van Fletcher, Mr. Summersill, Mr. Leary or Heary—excuse me, Your Honor—with an "H", all of these drivers said at that particular time, prior to Mr. Varnum becoming an employee of Nu-Car, that was not the case as to income. That was not the case. Mr. McAllister testified at his deposition that was not the case. In his affidavit he's more to the point explaining why he had to tell them, that he knew it was false when he told it to them, and yet he went forward with it. His reason was that he had to produce drivers, owner-operators for the company.

Your Honor, may I add one point? In the affidavit that was prepared by Mr. McAllister on April 11th, 1985, he states, and it's in paragraph 2, "I represented to Larry Varnum that he would be dispatched on a first-in-first-out basis. I never told Larry Varnum about the seniority dispatch system even though I was aware that it had been discussed within the company, but it was not for publication because if it was discussed openly, I would never be able to get new drivers such as Larry Varnum to sign with the company."

And I've taken the time, Your Honor, to quote that for the record and argue to the Court because in summary that is what I've been saying as to what Mr. McAllister, the pressure he was under to produce these drivers.

On the last page of that same affidavit by Mr. [24] McAllister, he states, "In this situation. . ."—in other words his conversations with Mr. Varnum prior to becoming a member of the union or an employee—". . . Larry Varnum was a victim of the situation for all he had to

rely on was my representations to him, and I was under pressure from the company to maintain a steady supply of drivers."

I would wait, and if the Court has any questions, I would wish to respond.

The Court: No, thank you. I think Mr. Young could respond.

Mr. Young, you need not respond to any of the argument, I think, unless you wish to, except for the last issue which I don't think you addressed, and that is concerning the allegation that Mr. McAllister told the plaintiff that he would make $7,000 knowing that it was untrue even if the plaintiff was dispatched on a first-in-first-out basis.

Mr. Young: Thank you, Your Honor.

First of all, in the deposition of Mr. McAllister he states that he showed Mr. Varnum the drivers' productivity list because it was the only way he could give him an idea of what kind of trips they involved, where the drivers went, and it was that list that showed gross revenues of the drivers. He states that he informed Mr. Varnum that he would receive 65 percent of those revenues.

The Court: Mr. Pafford, why don't you take the [25] lectern. That's on page 4 and 5 of the defendant's brief. I really haven't focused on that. Can you tell me what you have that would support Mr. McAllister telling your client that he would make $7,000 when he knew it was untrue if he was dispatched on a first-in-first-out basis. Did he manipulate, were these figures forgeries or something like that? I must have missed something.

Mr. Pafford: Your Honor, you're asking do I have any documentation to support the $7,000 figure. Am I

correct? I just want to respond directly to the Court's question.

The Court: That Mr. McAllister knew that the gross revenues per driver were not true. In other words, on page 4 Mr. McAllister testified that during the interview process he showed Varnum the computer printout of the driver productivity list from prior months in order for Varnum to get an idea of the gross revenues earned by Nu-Car's drivers. McAllister stated it was his normal practice to show driver applicants the driver productivity list because it was the best representation of a driver's potential earnings that McAllister could provide. According to McAllister's testimony, the gross revenues per driver per month at that time ranged from $3,000 to $20,000, dependent on how motivated the individual is. Each driver received 65 percent of the gross revenues attributable to that driver pursuant to [26] the collective bargaining agreement. Mr. McAllister also testified that he never made any assurances regarding profits to Varnum or to anyone else, and that it would have been impossible to make any representations regarding the quantity of future business of Nu-Car because of its common carrier status.

Ignoring that last sentence, but the representations that Mr. McAllister made to your client concerning showing him the computer printout, I really didn't understand your argument concerning that.

Is your argument that the computer printout was false, I mean that he—

Mr. Pafford: No, Your Honor. My argument is, and I didn't meant to cut the Court off.

The Court: Go ahead. I just didn't understand.

Mr. Pafford: My argument is that according to the depositions and affidavits, Mr. McAllister knew, as he stated, that Mr. Varnum who had no experience in the trucking industry, so he showed a printout, as counsel has advised the Court.

Now, if I understand the Court's question correctly, and correct me if I'm wrong, Your Honor,—you're asking do I have any documentation in the file showing that Mr. Varnum or that Mr. McAllister represented an untruth as to the $7,000? In other words, where did the $7,000 come from?

[27] The Court: Well, you were saying that Mr. McAllister showed your client printouts of how much drivers made, knowing that they were not true, and I'm trying to figure out what was untrue about it. In other words, that he really knew your client couldn't make that money because he wasn't as experienced as the other drivers?

Mr. Pafford: Yes, Your Honor, and I would ask the Court to look at the affidavit of Mr. Paul McAllister of April 11th, 1985, on page 1, it addresses this point.

"During these meetings and prior to Larry Varnum joining the company, I represented to him the following. That he could make enough money to cover the expense and maintenance of his tractor. Said expense and maintenance would average $3,100 per month based on $1.40 average per loaded mile running 1,200 miles per week. I further showed Larry Varnum documentation that drivers at the time were grossing $3,000 per month for a driver who had his truck in the shop most of the time, to an active driver making $15,000 a month."

Now, the other two paragraphs do not apply to this point. But in the bottom of page 2 of that same affidavit, Mr. McAllister states the following.

"All of these representation I made to Larry Varnum in order to bring him into the company as an owner-operator of Nu-Car carriers. I made these representations because of the terminal manager; I was under pressure from my superiors to [28] provide a sufficient number of owner-operators on hand at all times to handle the normal traffic."

The Court: Fine. He made those representations; let's assume that. He showed him the amount of money that other drivers were making. Fine.

Mr. Young: Your Honor, may I—

The Court: Yes, I'm going to want to hear from you. Go ahead.

Mr. Pafford: And at the bottom of page 3, and this ties in all of that, those points.

"In this situation Larry Varnum was a victim of the situation for all he had to rely upon was my representations to him, and I was under pressure from the company to maintain a steady supply of drivers."

I've just focused on the point of the $7,000 and how it was used to dupe, if you will, Mr. Varnum into becoming an owner-operator.

The Court: Thank you.

Mr. Young.

Mr. Pafford: May I sit down, Your Honor?

The Court: Yes.

Mr. Young: Your Honor, I'd like to address the statement in Mr. McAllister's affidavit that Mr. Varnum—that it was represented to Mr. Varnum that he could cover his expenses.

[29] I believe Your Honor summarized this earlier in the deposition which was taken prior to that affidavit. On page 26 Mr. McAllister was asked if Mr. Varnum ever expressed a concern that he did not want to make this investment if he could have a return for profit. Mr. McAllister said, "Well certainly every driver I ever hired expresses that."

"Question. Did you assure him there would be any?

"No, I never assured anybody of anything."

That statement, among other statements in the affidavit, is inconsistent with his deposition, and I would say at best for the plaintiff, Mr. McAllister's testimony is nullified.

I'm sorry. Your Honor was asking me to address a certain point. Have I done that?

The Court: Yes, but didn't you just tell me it's a disputed question of fact as to whether or not he was assured he would make a certain amount of money?

Mr. Young: Your Honor, plaintiff in his brief specifically points out that the gravamen of this complaint is the change in the seniority system from the first-in-first-out.

The Court: I understand that, but that's not what I've been hearing.

Well, let's assume that I let summary judgment out, and I permit him to amend his complaint, and what it

would read would be, that he promised me that I would make this much [30] money when he well knew that I was less experienced and I could never do it.

Mr. Young: Your Honor, the complaint I beleive already alleges something to that effect, and the deposition of plaintiff's witness Paul McAllister, the only deposition taken in this case, points out that Mr. McAllister was fired by the company prior to his deposition being taken.

Mr. McAllister clearly states in his deposition that he showed him the driver productivity list and the computer printout; that it was not fraudulent; that it was the best representation that he could show him as to what a driver would make; that he never assured Mr. Varnum anything regarding earnings or profit. I would submit that there is no issue of material fact in this case on that point.

I would also like to point out that in the deposition Mr. Pafford has pointed out before that Mr. Varnum was not a member of the union at the time these changes were made after he became employed. That is an irrelevant factor because the union was a statutory representative the moment that he became an employee under Section 9 of the National Labor Relations Act.

And finally, Your Honor, that Mr. McAllister at that time was a representative for the company; that is true. And he was responsible for hiring drivers. He clearly states in his deposition that he pointed out to Mr. Varnum that the [31] union, that the employees and drivers were represented by a union, and that Mr. Varnum should contact that union and have any questions answered. Perhaps he might have found out about these rumors which, I don't know, but he should have contacted that union. Mr. McAllister states that as far as he knew, Mr. Varnum did not contact the union.

It is not the company's statutory responsibility to represent these employees. In fact, the company is restricted in certain communications it has with the employees when they are represented by a union. Mr. Varnum was made aware of the existence of the union, and he failed to go see the representative.

Are there any other questions, Your Honor?

The Court: No. Thank you.

Mr. Young: If I could, I'd like to make a general conclusion statement about this case, the meaning of this case.

I'd like to point out that although this change in dispatch and the subsequent reduction in earnings to a junior driver does present perhaps a sad story, we are not arguing here today that plaintiff had no avenue for a remedy. On the contrary, the Federal labor laws and the collective bargaining agreement arrived at pursuant to those laws provided plaintiff with a very well defined framework in which to seek the remedy, the grievance machinery in the [32] collective bargaining agreement, and if he did not get satisfaction through that procedure and from his statutory representative, the union, he had the right to bring a suit under Section 301 against Nu-Car and the union. However, Mr. Varnum must file the procedural requirements of that framework, and Nu-Car cannot be held responsible for his failure to do so.

The Supreme Court in Allis-Chalmers, again decided April 25th or the 16th—I'm sorry—said, "In deciding whether state law is pre-empted, it must be decided whether allowing a particular state law claim that would frustrate the Federal labor contract scheme established in Section 301."

Nu-Car is governed by the Federal statutory framework in bargaining with and hopefully reaching agreement with the union regarding the terms and conditions of employment for those employees represented by the union.

Plaintiff is asserting his continued right to be dispatched on the first-in-first-out basis and the change in that which resulted in a reduction of earnings for purposes of this motion, despite the fact that his representative proposed and agreed to that change and the dispatch system after he was employed by Nu-Car.

This action challenges the right and the Federal requirement of an employer and a union to collectively bargain for changes in the terms and conditions of jobs [33] represented by the union, to meet the changing conditions of the economy in the workplace.

Your Honor, if employers can be faced with state law claims of individual employees derived from changes in the collective bargaining agreement arrived at through the Federal required bargaining process, obviously employers would not bargain or agree to any changes, and the Federal system would fail.

Thank you, Your Honor.

Mr. Pafford: Your Honor, may I ask a question?

The Court: Certainly.

Mr. Pafford: I realize counsel has concluded. And Your Honor during the course of my questions to me and the questions to counsel appeared to focus on the point of time after Mr. Varnum became a member of the company to the time that he became a member of the union.

Could I ask the Court or cite the Court to a particular page in a deposition? That's my question.

The Court: Certainly.

Mr. Pafford: On page 25 of Mr. McAllister's deposition that counsel has used as factual authority, on line 9, beginning at line 9 where it says, "During that thirty. . ." —talking about when an employee becomes a member of Nu-Car, how soon thereafter can an individual employee become a member of the union, and what are the union's rights [34] to that employee. It says, "During that thirty-day probationary period how was the individual such as Mr. Varnum more vulnerable than let's say someone who has been there over thirty years? I mean by vulnerable, I mean his employment status.

"Answer. During that thirty-day period somebody can be discharged with no explanation required.

"Question. Can the union voice any objection?

"Answer. No, they cannot."

Again, I would like to argue, but I do not want to tax the Court's time. I'll be glad to respond to why I'm asking the Court to consider that particular point.

The Court: I think—

Mr. Pafford: I didn't want to violate the procedure that the Court has.

The Court: If you want to say anything, we've sort of gone back and forth, so if you would like to say anything else, you're welcome to. I've got the time.

Mr. Pafford: Thank you, Your Honor.

On that particular point I have followed counsel's argument that labor law and the cases, I submit don't support his argument, but as to the facts, we're talking about an individual whose acts occurred, misrepresentations prior

to employment, and counsel says still the union can redress the wrong. Citation from page 25 of Mr. McAllister's deposition [35] shows at that particular point in time, there is no authority from the union.

I would submit the availability of redress to the union is now becoming a factual question because there is nothing firm in the record that totally says there is no denied fact, so to speak, that Mr. Varnum had access to the union for acts committed or perpetrated against him prior to becoming a member of the company or the union. There is no agreement on those facts. And I thank the Court.

Mr. Young: Your Honor, briefly may I respond?

The Court: Yes.

Mr. Young: That's not a question of fact, and I would point the Court to Section 9 of the National Labor Relations Act that provides that representatives selected by the majority of the employees should be representative of all of the employees. Regardless of whether Mr. Varnum or anyone else ever became a member of the union, the company is required to bargain with the union whether it likes to or not, and employees, all of them within those bargaining union jobs are required to be represented.

Secondly, Section 8(b) of the Act forbids the union from discriminating against employees with regard to membership. Once Mr. Varnum became an employee, he was covered by that collective bargaining agreement; the union had by law to represent him in the same manner they represented everyone [36] else, regardless of whether he was a member or not.

The Court: The Court at this time would find that the allegations in this case and the facts in this case are very similar to the Eitmann case. The Court would find

that the representations relied on by Eitmann were made prior to his being hired. He later, upon employment, joined the union, like Varnum, and his suit for breach of contract was on the promises allegedly made to him prior to his hiring.

The Court would find that the terms of the plaintiff's employment are established through the collective bargaining process between the defendant and Varnum's agent, the union, and were specifically addressed in the collective bargaining agreement.

The collective bargaining agreement further contains a procedure to resolve employee grievances and questions of interpretations, thus contract grievance procedure and Section 301 of the Act provide Varnum's potential remedies, and the state law claim is pre-empted by Section 301. And those claims would be those claims that could be resolved in the collective bargaining agreement. The Court would grant summary judgment as to those claims involving the first-come-first-serve and the home base operation.

Frankly, I'm a bit confused by plaintiff's argument, and I'm not sure whether or not there is really another claim, a claim that would not be contained in the collective [37] bargaining agreement. And so I'm going to direct the clerk to enter summary judgment as to those claims contained in the collective bargaining agreement and permit counsel for the plaintiff, within thirty days, well, I think twenty days would probably be sufficient, to file a complaint if he feels there are any claims not contained in that agreement, and so I can see exactly what plaintiff's position is. I was a little lost in that portion of the argument perhaps because it was not my focus in reviewing the law and the facts in the case.

FINAL JUDGMENT OF DISMISSAL OF THE CIRCUIT COURT FOR DUVAL COUNTY, FLORIDA

(Dated August 26, 1985)

Case No. 84-14461-CA

IN THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA.
DIVISION: A

LARRY T. VARNUM,
Plaintiff,

vs.

NU-CAR CARRIERS, INC.,
Defendant.

FINAL JUDGMENT OF DISMISSAL

This cause was removed to The United States District Court For The Middle District of Florida, Jacksonville Division in December, 1984 and is being actively litigated in that Court. Accordingly, it is

ORDERED AND ADJUDGED that this cause is hereby dismissed in this Court without prejudice. The Clerk of this Court is directed to close this file and remove the same from the Computer list of active cases.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida this 26th day of August, 1985.

/s/ JOHN S. COX
Circuit Judge

JUDGMENT ENTRY OF THE UNITED STATES COURT OF APPEALS FOR ELEVENTH CIRCUIT

(Entered November 10, 1986)

No. 85-3898

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
D.C. Docket No. 84-1416

LARRY T. VARNUM,
Plaintiff-Appellant,

versus

NU-CAR CARRIERS, INC.,
Defendant-Appellee.

Appeal From the United States District Court for the Middle District of Florida

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Before FAY and JOHNSON, *Circuit Judges*, and HOFFMAN*, *Senior District Judge*

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

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*Honorable Walter E. Hoffman, Senior U. S. District Judge for the Eastern District of Virginia, sitting by designation. HOFFMAN, Senior District Judge, specially concurred and filed an opinion.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, REVERSED; and that this cause be and the same is hereby, REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that defendant-appellee pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

For the Court: Miguel J. Cortez,
Clerk

By: /s/ David Maland
Deputy Clerk

ISSUED AS MANDATE: JAN 07 1987

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Filed December 23, 1986)

No. 85-3898

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LARRY T. VARNUM,
Plaintiff-Appellant,

versus

NU-CAR CARRIERS, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Before: FAY and JOHNSON, *Circuit Judges*, and HOFFMAN*, *Senior District Judge*

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active

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*Honorable Walter E. Hoffman, Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ FRANK M. JOHNSON
United States Circuit Judge

RESPONDENT'S STATE COURT COMPLAINT

Case No. 84-14461-CA

IN THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA
DIVISION-A

LARRY T. VARNUM, an individual,
Plaintiff,

v.

NU-CAR CARRIERS, INC., a corporation,
Defendant.

COMPLAINT

COMES NOW the Plaintiff, LARRY T. VARNUM, and sues the Defendant, NU-CAR CARRIERS, INC., a Massachusetts corporation, authorized and doing business in the State of Florida, (for convenience hereinafter referred to as the Defendant-NU-CAR CARRIERS), and in support thereof would respectfully aver as follows:

COUNT I

1. This is an action in equity for fraud, seeking compensatory damages in excess of Five Thousand Dollars ($5,000).

2. On or about June 2, 1983, the Plaintiff, LARRY T. VARNUM, entered into an employment agreement with the Defendant-NU-CAR CARRIERS, here in Jacksonville, Duval County, Florida.

3. Previous to this employment agreement, the Plaintiff was gainfully employed in a separate business, and via the representations more specifically alleged hereinafter, the Defendant-NU-CAR CARRIERS through its agents, employees and representatives did entice the Plaintiff to leave his previous gainful employment and pursue employment with said Defendant. These fraudulent representations made by the Defendant-NU-CAR CARRIERS to the Plaintiff, LARRY T. VARNUM, are more specifically outlined as follows:

(a) That the Defendant-NU-CAR CARRIERS would provide sufficient work for the Plaintiff, LARRY T. VARNUM, that would enable him to receive an average monthly income of Seven Thousand Dollars ($7,000) as an automobile carrier driver, and that his income would be sufficient to satisfy his initial investment in a tractor-trailer truck as required by the Defendant;

(b) That in this capacity as an automobile carrier driver, the Plaintiff, LARRY T. VARNUM, would obtain work or be "dispatched" on a continuous first-in-first-out basis, and

(c) That the Defendant-NU-CAR CARRIERS would continue to employ the Plaintiff, LARRY T. VARNUM, via a home base of operation in Jacksonville, Duval County, Florida;

(d) Such other fraudulent representations as may appear from the evidence.

4. As a condition precedent to this employment, it was represented to the Plaintiff, LARRY T. VARNUM, that he would be required to purchase and expend a large sum of money for the investment in a tractor-trailer truck, for the use in this employment as a car carrier driver, and that

said tractor-trailer truck was to be no older than two (2) model years from the date of his employment.

5. The aforementioned specific and material statements represented to the Plaintiff, LARRY T. VARNUM, by and through the agents, employees and representatives of the Defendant-NU-CAR CARRIERS, were false in that notwithstanding that the Plaintiff left his previous employment in reliance on these representations, thereafter, the Plaintiff, although continuing to go to work and be available to work for the Defendant-NU-CAR CARRIERS, the following occurred, all of which was contrary to the previous specific representations of the Defendant, and were relied upon by the Plaintiff:

(a) That the Defendant-NU-CAR CARRIERS failed to provide sufficient work, in that the Plaintiff, LARRY T. VARNUM never received an average monthly income of Seven Thousand Dollars ($7,000) per month.

(b) That the Plaintiff, LARRY T. VARNUM, never received sufficient income to off-set the amount of his initial investment for the tractor-trailer truck required by the Defendant-NU-CAR CARRIERS.

(c) That the Defendant-NU-CAR CARRIERS further rescinded its agreement regarding "first-come-first-serve" dispatch, and thereafter dispatched trucks based on a seniority system which precluded the Plaintiff from obtaining work.

(d) That contrary to the previous representations of the Defendant-NU-CAR CARRIERS said Defendant advised the Plaintiff that he would have to relocate his home base of operation outside of Jacksonville, Duval County, Florida.

6. The Defendant-NU-CAR CARRIERS knew that at the time the representations were made to the Plaintiff as aforementioned that said representations were false.

7. The Defendant-NU-CAR CARRIERS did intend the Plaintiff to rely upon said false representations.

8. The Plaintiff, LARRY T. VARNUM, did so rely on the aforesaid false representations, and was damaged thereby.

9. As a direct and proximate result thereof, the Plaintiff, LARRY T. VARNUM, suffered severe financial loss of his investment, in that pursuant to the representations aforementioned made by the Defendant-NU-CAR CARRIERS, the Plaintiff did purchase a 1982 GMC "Brigadier" tractor-trailer truck, please see Plaintiff's Exhibit "A",* and further, in direct reliance on the aforementioned specific fraudulent representations by the Defendant, the Plaintiff, LARRY T. VARNUM, suffered additional financial loss regarding income, and expenses during that period of time through May, 1983 to March 12, 1984.

WHEREFORE, the Plaintiff demands judgment for compensatory damages.

COUNT II

10. The Plaintiff, LARRY T. VARNUM, realleges each and every allegation contained in the paragraphs of Count I.

11. This is an action in equity seeking punitive damages for the willful and malicious fraudulent misrepresentation by the Defendant-NU-CAR CARRIERS.

12. The Plaintiff, LARRY T. VARNUM, claims punitive damages as a result of the willful and malicious conduct of the Defendant-NU-CAR CARRIERS which demonstrated a reckless indifference to the rights of others, in

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*This exhibit is omitted in printing.

that said Defendant in making the aforesaid fraudulent representations to the Plaintiff, LARRY T. VARNUM, was motivated by a profit as opposed to the independent rights of the automobile car carriers, such as the Plaintiff, and did engage in an independent scheme which was designed to satisfy its own requirements, to wit: to make available for itself a large number of automobile carrier trucks and drivers, while at the same time exposing said drivers, such as the Plaintiff herein, to all the risks and liability for costs for the initial purchase, and subsequent maintenance on said vehicles, all of which, i.e. risks, costs and employment, were contrary to the previous specific representations of the Defendant-NU-CAR CARRIERS, and unknown to the Plaintiff. The Plaintiff, LARRY T. VARNUM, would not have entered into the aforesaid employment agreement but for the fraudulent representations on the part of the Defendant-NU-CAR CARRIERS. Said independent scheme, constituted willful and malicious conduct demonstrating a reckless indifference to the rights of others, such as the Plaintiff.

13. The Defendant-NU-CAR CARRIERS, in engaging in this scheme of fraudulent representations constituted willful and malicious conduct on the part of said Defendant in that the Defendant knew that the representations were false, and that the Plaintiff would rely on these representations of the Defendant-NU-CAR CARRIERS.

14. As a direct and proximate result of the fraudulent representations that constituted willful and malicious conduct on the part of the Defendant-NU-CAR CARRIERS. and the reliance of the Plaintiff, LARRY T. VARNUM, on said fraudulent representations, the Plaintiff suffered severe financial loss of his investment in that pursuant to the representations aforesaid made by the Defendant-NU-CAR CARRIERS, the Plaintiff did purchase a 1982 GMC

"Brigadier" tractor-trailer truck, please see Plaintiff's Exhibit "A", and further, in direct reliance on the willful and malicious fraudulent representations by the Defendant, the Plaintiff, LARRY T. VARNUM, suffered additional financial loss regarding income, and expenses during that period of time through May, 1983 through March 12, 1984.

WHEREFORE, the Plaintiff demands judgment for punitive damages.

PENLAND, PENLAND, PAFFORD
& JONES, P.A.
/s/ JOHN W. PAFFORD
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86 1544

No.

Supreme Court, U.S.
FILED
APR 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October Term, 1986

NU-CAR CARRIERS, INC.,
Petitioner,

VS.

LARRY T. VARNUM,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Eleventh Circuit

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Larry T. Varnum

18 pp

QUESTION PRESENTED

Whether a common law cause of action for fraudulent misrepresentation is preempted by Section 301 of the Labor-Management Relations Act or by the National Labor Relations Act where: (1) The employer's representations were made to the plaintiff prior to his employment at a time when he was neither an employee or member of a collective bargaining unit, and (2) at the time the representations were made by the employer, the employer knew that the representations were false, the employer knew that the plaintiff would rely on these representations, and the plaintiff did rely on these representations and suffered damage as a result.

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I. The Respondent's cause of action for fraudulent misrepresentation is not preempted by Section 301 of the Labor Management Relations Act. 8

II. The Respondent's cause of action for fraudulent misrepresentation is not preempted by the National Labor Relations Act, and does not conflict with this Court's decision in *San Diego Building Trades Council v. Garmon*, or with the decisions of other Federal Courts of Appeals applying Garmon to similar cases. 13

CONCLUSION 13

TABLE OF AUTHORITIES

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No.

In the Supreme Court of the United States

October Term, 1986

NU-CAR CARRIERS, INC.,
Petitioner,

vs.

LARRY T. VARNUM,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Eleventh Circuit

The Respondent, Larry T. Varnum, respectfully prays that the Petition for a Writ of Certiorari filed by the Petitioner on March 23, 1987, in the above-captioned matter, to review that judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in the above-captioned matter, bearing Case No. 85-3898, on the 20th day of November, 1986, be denied.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eleventh Circuit in Case No. 85-3898 is reported at 804 F.2d 638 and is reproduced in the Petitioner's Appendix at A1 to A18.

The Opinion of the United States District Court for the Middle District of Florida in Case No. 84-1416-Civ-J-14 was delivered orally by the Court on October 22, 1985, at the hearing conducted on Defendant Nu-Car Carrier, Inc.'s Motion for Summary Judgment. The transcript of the Motion for Summary Judgment announcing the unreported Opinion of the Court is reported in the Petitioner's Appendix at A20 to A49.

The Judgment of the United States District Court for the Middle District of Florida in Case No. 84-1416-Civ-J-14 is reproduced in the Petitioner's Appendix at A19.

Respondent's complaint was initially filed in State Court of the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida as Case No. 84-14461-CA. The complaint was subsequently removed by Nu-Car to the United States District Court for the Middle District of Florida. The final judgment of dismissal of the Florida Circuit Court is reproduced in the Petitioner's Appendix at A50.

The Opinion of the United States Court of Appeals for the Eleventh Circuit in Case No. 85-3898 is reproduced in the Petitioner's Appendix at A51.

JURISDICTION

The Respondent objects to the Petition for Writ of Certiorari to review that judgment and opinion of the Eleventh Circuit Court of Appeals issued on November 20, 1986, on the grounds that it was not timely filed and therefore should be denied.

The Petitioner filed a timely Petition for Re-Hearing En Banc on December 10, 1986, an Order of the Court of Appeals was entered denying said Petition on December 24, 1986, which is reproduced in Petitioner's Appendix at A53 and A54. The filing of this Petition for Writ of Certiorari is not timely pursuant to U.S.Sup.Ct.R. 20.1, which states:

"A Petition for Writ of Certiorari to review the Judgement in a criminal case of a State Court of last resort or of a Federal Court of Appeals shall be deemed in time when it is filed with the Clerk within *60 days* after the entry of such judgment." (emphasis added).

Further, U.S.Sup.Ct.R. 20.4, states in relevant part that:

"The time for filing a Petition for Writ of Certiorari runs from the date the Judgment or decree sought to be reviewed is rendered and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a Petition for Re-hearing is timely filed by any party in the case, *the time for* filing the Petition for Writ of Certiorari for all parties (whether or not they requested rehearing or joined in the Petition for Re-hearing) runs *from the date of the denial of re-hearing or of the entry of a subsequent judgment entered on the re-hearing.*" (emphasis added).

Therefore, in this instance, the time for filing the Petition for Certiorari began to run from December 24, 1986, and sixty days thereafter. On February 25, 1987, the time for filing this Petition for Writ of Certiorari had ended.

STATUTORY PROVISIONS INVOLVED

Labor-Management Relations Act of 1947 Section 301(a), 29 U.S.C. Section 185(a):

Suits for violation of contracts between an employer and any labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount of controversy or without regard to the citizenship of the parties.

National Labor Relations Act Section 99(a), 29 U.S.C. Section 159(a):

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, that any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, that the bargaining representative has been given opportunity to be present at such adjustment.

STATEMENT OF THE CASE

The Respondent, Larry T. Varnum, (hereinafter referred to as the "Respondent-Varnum"), was a truck driver who sought employment from the Petitioner, Nu-Car Carriers, Inc., (hereinafter referred to as the Petitioner-Nu-Car), a common carrier engaged in the transport of new cars. In order to gain employment with the Petitioner-Nu-Car, a trucker must first, prior to his employment purchase his own equipment, including a certain type of tractor-trailer not more than two years old, which equipment costs approximately $60,000.00. The Respondent-Varnum negotiated with a representative of the Petitioner-Nu-Car in May, 1983, regarding prospective employment. During their discussions, the representative told the Respondent-Varnum that the Petitioner-Nu-Car allocated work

according to a first-in-first-out basis that provided equal work opportunities to truckers regardless of their seniority. The truckers were paid about 65% of the gross amount that the Petitioner-Nu-Car received for each load the truckers transported.

The statement concerning the dispatch seniority system was consistent with the Collective Bargaining Agreement in effect at the time between the Petitioner-Nu-Car and the Union representing the Petitioner's employees.

The representative also showed the Respondent-Varnum computer print-outs that indicated that the average monthly gross income for truckers with the Petitioner-Nu-Car, based on the past few months, had been approximately $7,000.00. The information contained in these print-outs was correct as of that time.

While the Respondent-Varnum was negotiating for his prospective employment with the Petitioner-Nu-Car, the Petitioner was in the process of drafting a proposal to change from the first-in-first-out basis of dispatch to a seniority-based dispatch system. Under this dispatch system, new loads would be assigned to the most senior trucker available. This system would have a disastrous affect on a new trucker.

This new system was partially designated to enable the Petitioner-Nu-Car to save on the cost of health care, welfare, and pension benefits. None of these benefits were available to the Respondent-Varnum, as he was not an employee, or member of the Union, at the time of these representations and negotiations.

The representative of the Petitioner-Nu-Car knew of the proposal regarding change in dispatch systems during the employment negotiations, yet failed to inform the Respondent-Varnum of the pending change. The deposition of Paul McAllister, at 73-79; Affidavit of Paul McAllister, at 1-2.

More significantly, the representative knew that if the change was implemented this representation that the Respondent-Varnum might earn $7,000.00 per month would be false.

On June 2, 1983, the Respondent-Varnum began work for the Petitioner-Nu-Car. After June 27, 1983, the Petitioner-Nu-Car and the Union began to renegotiate the Collective Bargaining Agreement. These negotiations resulted in a new agreement, concluded on about July 8, 1983, which implemented a change in the dispatch procedure to a seniority-based system. When the new dispatch system was then put into effect, the Respondent-Varnum's income fell drastically. Thereafter, in March, 1984, the Respondent-Varnum resigned from the Petitioner-Nu-Car's employment with a financial loss of approximately $85,000.00.

In November, 1984, the Respondent-Varnum filed a Complaint against the Petitioner-Nu-Car in Florida State Court alleging that the Petitioner had fraudulently misrepresented to him the conditions of employment in order to induce him to accept employment. The Respondent sought compensatory and punitive damages. In December, 1984, the Petitioner-Nu-Car removed the action to the United States District Court for the Middle District of Florida, based on diversity of citizenship.

In June, 1985, the Petitioner-Nu-Car moved for Summary Judgment on the grounds that the Respondent's Complaint was preempted by Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. Section 185, and by the National Labor Relations Act, 29 U.S.C. Section 151-169. On October 22, 1985, the District Judge granted the Petitioner's Motion for Summary Judgment.

On November 20, 1986, the Eleventh Circuit rendered an opinion reversing and remanding the case to District Court on the grounds that the Respondent's Complaint was not preempted by Section 301 of the Labor-Management Relations Act,

citing *Belknap, Inc. v. Hale,* 463 U.S. 491, 509-511 (1983). In addition, the Appeals Court rejected the Petitioner's argument that the Respondent's Complaint was preempted under Section 9(a) of the National Labor Relations Act ("NLRA"), which prohibits employers from "direct dealing" with individual employees in the absence of the majority designated collective bargaining representative.

It is undisputed that at the time the representations were made to the Respondent-Varnum, by representatives of the Petitioner-Nu-Car, that the Respondent, was *not* an employee of the Petitioner, *nor* was the Respondent a member of a collective bargaining unit.

REASONS FOR DENYING THE WRIT

The decision of the Eleventh Circuit is *not* in conflict with the United States Supreme Court or various Courts of Appeals decisions concerning the preemption of State Common Law actions for tort by Section 301 of the Labor-Management Act.

Specifically, the Petitioner has misconstrued the United States Supreme Court decision in *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202 (1985), in that the instant case, to-wit: common law action in tort, is *not* based on an interpretation of the collective bargaining agreement. As such the Respondent's complaint is *not* "inextricably intertwined", dependent or affected by the terms of the collective bargaining agreement.

In addition, the Eleventh Circuit's decision does not conflict with the National Labor Relations Act, "Preemption Doctrine", established by the United States Supreme Court in *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959). The Eleventh Circuit specifically states that its decision is *not* based on a finding of a duty on the part of employers

to reveal contemplated collective bargaining proposal to *prospective employees.*

I. THE RESPONDENT'S CAUSE OF ACTION FOR FRAUDULENT MISREPRESENTATION IS NOT PREEMPTED BY SECTION 301 OF THE LABOR-MANAGEMENT RELATIONS ACT

The decision of the Eleventh Circuit is *not* in conflict with the United States Supreme Court's decision in *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202 (1985).

In *Lueck,* 471 U.S. AT 105 S.Ct. 1904, an employee brought a State Law tort action against an employer and insurer seeking recovery for alleged bad faith in handling a claim pursuant to a nonoccupational disability insurance plan included in a collective bargaining agreement. There, the Supreme Court declared that the right being asserted was not only derived from a contract, but was defined by the contractural obligation of good faith.

In the present case, the conduct of which the Respondent complains, to-wit: fraudulent misrepresentations to a prospective employee, is totally outside of any contractural obligation. Further, it is clear that the right being asserted here is not derived from a contract, nor would it require any analysis of the contract. Instead, the right being asserted is totally outside of the collective bargaining contract for at the time the fraudulent misrepresentations were made the Respondent-Varnum was neither an employee of the Petitioner-Nu-Car, nor a member of a collective bargaining unit.

This fact that the proscribed conduct or rights sought to be established by the Respondent are clearly independent of a labor contract is totally supported by the Supreme Court decision in *Lucek:*

> "In extending the pre-emptive effect of Section 301 beyond suits for breach of contract, it would be *inconsistent* with Congressional intent under that Section to preempt States Rules that proscribe conduct, or establish rights and obligations *independent of a labor contract.*" (emphasis added) Also see *Malone v. White Motor Corp.*, 435 U.S. 497, 98 S.Ct. 1185, 55 L.Ed.2d 443 (1978).

Therefore, the facts of the instant case do not support the Petitioner's argument that the Respondent's claim is in any way dependent or meshed with the collective bargaining agreement.

The Eleventh Circuit's decision is not in conflict with other Courts' of Appeal decisions which have based, on *different facts,* preempted State tort actions under Section 301. The Petitioner's reliance on *Bale v. General Telephone Company of California,* 795 F. 2d 775 (9th Cir. 1986), is inapplicable for its based on different facts. Yet, the Petitioner urges it's application. In *Bale,* the plaintiffs did *not* appeal the District Court's entry of Summary Judgment on their Section 301 and State contract claims. More importantly, the basis of the Plaintiff's claims in *Bale,* was premised on a comparison, analysis and interpretation of the collective bargaining agreement. Such is not required in the instant case. Instead, as admitted by the Petitioner:

> "...At the time these representations (fraudulent misrepresentations), were made, they were entirely true and, indeed, accurately reflected the existing terms of the collective bargaining agreement between Nu-Car and the Union." Petition p.4.

Therefore, at no time is the Respondent asserting that his claim has any relation whatsoever to the collective bargaining agreement. The Eleventh Circuit Court held that the District Court misconstrued the essence of the Respondent's complaint.

This misconstruction is now being urged by the Petitioner in its present Petitions.

What is important, as found by the Eleventh Circuit is that the Respondent's Complaint did not go to the terms of employment covered by the collective bargaining agreement. Instead, the complaint involved the Respondent's conduct *prior to* the Respondent accepting employment. Petitioner's Appendix at A7.

Likewise, the Petitioner's reliance on *Gibson v. AT&T Technologies, Inc.*, 782 F.2d 686 (7th Cir. 1986), and *Eitmann v. New Orleans Public Service, Inc.*, 730 F. 2d 359 (5th Cir. 1984), is inapplicable. In *Gibson*, the plaintiffs at the time which they were withheld information concerning plans to close a plant were *employees* of the employer-defendant. As employees, and as members of a collective bargaining unit, they were clearly within the jurisdiction of Section 301(a). In the instant case, the Respondent was *not* a party to a labor agreement, therefore, the "Preemption Doctrine" does not apply.

Also, it is clear that the Eleventh Circuit's decision in this case does *not* conflict with the decision of the Fifth Circuit rendered in *Eitmann v. New Orleans Public Service, Inc.*, 730 F.2d 359 (5th Cir. 1984). There, the plaintiff filed suit in State Court alleging breach of an individual contract of employment. The present Respondent is *not* alleging breach of any contract, but instead, alleges that prior to his employment, and prior to his representation by any collective bargaining unit, the Petitioner-Nu-Car failed to inform him of the impending change as a means to induce him to accept employment. As found by the Eleventh Circuit, "Because the complaint focused on conduct that occured *prior to* the Plaintiff's accepting employment, the case is distinguishable from *Eitmann*, and is not preempted by Section 301."

In *Belknap, Inc. vs. Hale*, 463 U.S. 491, 509-511, 103

S.Ct. 3172, 3182-83, 77 L.Ed.2d 798, the Supreme Court upheld a State law action for fraudulent misrepresentation by employees who had replaced strikers and were subsequently discharged. Although the plaintiffs had been told *prior to* their accepting employment that they would be permanent replacements, this was *not* preempted by Federal Labor Laws. Petition's Appendix at A6-7. The Supreme Court's decision in *Belknap* is the controlling authority in the instant case.

II. THE RESPONDENT'S CAUSE OF ACTION FOR FRAUDULENT MISREPRESENTATION IS NOT PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT, AND DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *SAN DIEGO BUILDING TRADES COUNCIL V. GARMON,* OR WITH THE DECISIONS OF OTHER FEDERAL COURT'S OF APPEALS APPLYING *GARMON* TO SIMILAR CASES.

The Eleventh Circuit correctly held that the Respondent State fraud claim was *not* subject to the NLRA Preemption Doctrine as set forth in *San Diego Building Trades Council v. Garmon,* 395 U.S. 236 (1959).

In essence, the Petitioner would seek to misconstrue the intent of the Federal Labor Law.

The Eleventh Circuit found that at the time the Petitioner's representative told the Respondent that drivers' typically grossed $7,000.00 per month, and that he (the Petitioner's representative) knew that the company was planning to propose a change in the dispatch system under which new drivers, such as the Respondent, would earn substantially less. The Eleventh Circuit further found that pursuant to Florida Law, such a representation regarding what the Respondent would expect to earn, in the absence of any disclosure regarding the impending

change could have been fraud. *Hamlen v. Fairchild Industries, Inc.*, 413 So. 2d 800 801 (Fla. 1st CDA 1982). Such an issue therefore, was an issue for the trier fact to decide. Petitioner's Appendix at A8-9.

Therefore, it is *not* that the "representations" are conduct controlled by the NLRA and require an interpretation of an existing labor agreement, but instead, that the "representations" are false statements made to a non-employee and non-union member and as such are actionable under State Law pursuant to the *Garmon Doctrine. Lynn v. Plant Gard Workers*, 383 U.S. 53, 15 L.Ed.2d 582 (1966).

Although not cited by the Petitioner, such conduct involving a common law tort has been held *not* to be preempted by Federal Law where the type of behavior or conduct, such as the instant case, i.e., fraudulent misrepresentations, create an independent tort which is actionable under State Law. *Farmer v. Carpenters*, 430 U.S. 290, 51 L.Ed.2d 338 (1977); *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 56 L.Ed.2d 209 (1978).

Finally, even assuming *arguendo* that the conduct complained of, i.e., fraudulent misrepresentations, did occur in the context of prospective employment, such conduct has been held to remain a part of the self-help remedy of the State causes of action and is not preempted by Federal Law. To do otherwise, the Supreme Court has declared, would leave the employer and union free to use their own economic weapons against one another and thereby free to injure innocent third parties, i.e., non-employees and non-union members, such as the Respondent. *Machinest v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 49 L.Ed.2d 396 (1976).

CONCLUSION

Based on the foregoing reasons, and authority as cited, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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